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Volume LIII
July—December, 1927.

PUBLISHED BY
MR. R. NARAYANASWAMI AIYAR, B.A., B.L.,
Vakil, High Court, Mylapore, Madras.

PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE.
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JUDGES OF THE HIGH COURT.

JULY—DECEMBER, 1927.

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THE

Madras Law Journal Reports.

VOLUME.] JULY, 1927. [LIII.

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

PRESENT:—LORD PHILLIMORE, LORD SINHA, LORD BLANESBURGH, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Lala Indar Prasad and another ... *Appellants** (*Plaintiffs*)

v.

Lala Jagmohan Das and another ... *Respondents* (*Defts.*).

P. C.

Lala Indar Prasad *v.* Lala Jagmohan Das

Indian Oaths Act (X of 1873), Ss 8, 9, 10 and 11—Special oath or solemn affirmation—Statement in presence of family Deity—When conclusive.

In a suit for partition between two Hindu brothers, the plaintiff, when filing in Court his lists of the joint family property alleged by him to be in the possession of the defendant, made the following offer: "Lala Indar Prasad (the plaintiff) says he will give up out of his lists such items as Jagmohan Das (the defendant) denies before the Deity Lachmi Narsinghji. Jagmohan Das accepts this." The Court, thereupon, appointed a local Commissioner, who proceeded to the plaintiff's house, and in the presence of the plaintiff and the Deity Lachmi Narsinghji he recorded the admissions and denials by the defendant of the items in the lists filed by the plaintiff.

Held, that these proceedings were tantamount to the administration to the defendant of the special oath or solemn affirmation contemplated by Ss. 8, 9 and 10 of the Indian Oaths Act, 1873, and, by virtue of the provisions of S. 11 of the Act, the admissions and denials of the defendant so recorded in the presence of the Deity were binding and conclusive upon the plaintiff.

The plaintiff was estopped (under the circumstances) from asserting that the Deity was, as a matter of fact, not actually present in the *dibba* (box) when the defendant's statements were recorded.

The agreement made between the parties (as recorded in the plaintiff's above offer) did not contemplate that the Deity would be actually invoked by the defendant when he attended to make in the presence of the God his admissions and denials. The proceedings were not, therefore, vitiated by the fact that no such invocation was made. Further, "if the state-

* P. C. Appeal No. 84 of 1925. 17th May, 1927.

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ments be made in the presence of the Deity introductory words of invocation become entirely unsuitable and are superfluous."

The form of the oath is immaterial. "It is laid down by all writers that the outward act is not essential to the oath. It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking."

Omychund v. *Barker,* (1744) 1 Atk. 22 relied on.

The "oath or solemn affirmation" referred to in Ss. 8 *et seq* of the Indian Oaths Act, 1873, is in its nature and essence quite distinct from the oaths and affirmations contemplated by S. 5 of the Act. All that is required by S. 8 is that the oath or solemn affirmation (therein referred to) may be "in any form common amongst or held binding by persons of the race or persuasion to which the deponent belongs and not repugnant to justice or decency." It may be as infinite alike in form and contents as racial custom or the dictates of any religious persuasion may sanction or require.

Neither an invocation nor an oath or affirmation in the technical sense of these words is in any way an essential part of the so-called oath or solemn affirmation referred to in S. 8 of the Indian Oaths Act

In cases where the special "oath or solemn affirmation" is permitted by Ss. 8, 9 and 10 of the Indian Oaths Act, it is not necessary to administer, in addition, the ordinary oath or affirmation referred to in S. 5 of the Act. The special "oath or solemn affirmation" when permitted is a complete substitute for the other.

The use of the alternative expression "oath" and "solemn affirmation" as a description of the special ritual envisaged in S. 8, Indian Oaths Act, indicates that the ritual is to be at least as solemn for the deponent and attended by the same consequences to him as is an ordinary oath or affirmation for and to an ordinary witness. The temporal consequences of corrupt falsehood follow as inevitably for the one class of witness as for the other.

An "oath or solemn affirmation" may be sufficiently "administered" to a witness, within the meaning of S. 10 of the Indian Oaths Act, when a statement is made by him in the presence of a Deity.

Judgment of the Judicial Commissioners affirmed.

Appeal (No. 84 of 1925) from a judgment and decree of the Court of the Judicial Commissioner, Oudh (10th March, 1924), affirming a decree of the Subordinate Judge, Lucknow (25th July, 1922).

This appeal arises out of a suit for partition brought on the 23rd September, 1915 by the appellant Lala Indar Prasad against his younger brother Lala Jagmohan Das. The second plaintiff and the second defendant (being sons of the plaintiff Lala Indar Prasad and the defendant Lala Jagmohan Das, respectively) were minors when the suit was instituted, but the second plaintiff attained majority before the proceedings were terminated in the Trial Court.

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The material facts are fully stated in the judgment of the Judicial Committee. The main question argued before their Lordships was, whether under the provisions of the Indian Oaths Act, 1873, certain statements made by the defendant in the presence of the family Deity were conclusive upon the plaintiff. The following additional facts will elucidate the matter.

On March 30, 1922, the Subordinate Judge recorded the following proceedings:—

"Lala Indar Prasad says he will give up out of his lists such items as Jagmohan Das denies before the Deity Lachmi Narsinghji. Jagmohan Das accepts this." "With the consent of the parties I appoint Babu Mahesh Prasad, Pleader, for going with the plaintiff's lists before Lachmi Narsinghji in plaintiff's house, and take defendant's admissions and denials of list items before the deity.......Statement of defendant Jagmohan Das to be taken before the deity by the Commissioner on Ekadeshi, 8th April, 1922, between 3 and 7 P. M. Commissioner and parties informed."

On April 4th, the defendant put in an application as follows:—

"In the above suit, plaintiff No. 1, on March 30, 1922, applied to abide by the oath of defendant No. 1. Plaintiff No. 2, son of the plaintiff No. 1, was a minor at the time of the institution of the suit in 1915, and he attained majority long ago. It is necessary to record his statement if he also relies or not on the oath of defendant No. 1. As 8th April, 1922 is fixed for administering the oath, that to avoid future disputes the plaintiff No. 2 may kindly be summoned before the aforesaid date of hearing."

On the 7th April, 1922, plaintiff No. 2 made an application to the same effect, ending with the words:—

"Accordingly the plaintiff No. 2 declares hereby that this agreement is binding on plaintiff No. 2 as well, and he abides by the above oath of Lala Jagmohan Das"

On the same date (7th April, 1922) the Court recorded a note to the effect that the last application leaves "the matter to the oath of the defendant No. 1, as his father Lala Indar Prasad has done. He says he is willing even if the defendant strikes out all the items claimed by the plaintiff."

The Commissioner accordingly went to the plaintiff's house on 8th April and recorded proceedings in the following form:—

"In a *kothri* in the house of the plaintiff at Bazar Raja."

"Before the *dibba* of Lachmi Narsinghji."

"Present—Lala Indar Prasad in person, and Lala Jagmohan Das in person."

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"Signed, Mahesh Prasad, Commissioner, 8th April, 1922."

"Lala Jagmohan Das states:—"My admissions and denials of Lists Nos 1 to 6 filed by plaintiffs are as follows;"

And then follows a serial list of items which are admitted and denied. Some of the items are admitted partially.

On April 10th the report of the Commissioner was filed in the Court with the record of the proceedings. That report is as follows:—

"In the above noted case I went to the house of Lala Indar Prasad, plaintiff, on April 8th at 3 P. M. and in a *kothri* of the deities and in the presence of the *dibba* known as the Lachmi Narsinghjika *dibba* as admitted by the parties who were present in person (except the defendant No. 2), I recorded the admissions and denials of the items in the lists filed by the plaintiff as given to me by Lala Jagmohan Das. I may note that the plaintiff wanted that the defendant himself should write his admissions or denials on the lists but the defendant refused to do so and so I proceeded to record them myself".

The following extracts from the judgment of the learned Judicial Commissioners (Messrs. Neave and Kendall) are instructive for a correct appreciation of the contentions raised by the appellant (plaintiff) before the Privy Council:—

"It is argued for the plaintiff, that it was essential for the proceedings to be taken on oath if they were to be binding under the Oaths Act, and that the proceedings were not taken on oath The respondent (defendant) argues that the proceedings were taken on oath and he has an alternative argument to the effect, that even if the proceedings were not binding under the Indian Oaths Act, they were binding as an agreement."

"It is the case for the plaintiff-appellant that he offered to be bound by such an oath (*i. e.*, by such an oath is mentioned in S. 8 of the Indian Oaths Act) and that the defendant-respondent agreed to make such an oath, but that the proceedings recorded by the Commissioner do not amount to the making of such an oath by the defendant".

"In the present grounds of appeal it is alleged that no oath had been administered to the defendant by the Commissioner, and that the denials made by the defendant were, therefore, not binding, that the mere presence of the deity was not tantamount to the administration of an oath under the Indian Oaths Act, and that the proceedings of the Commissioner were not carried out in the presence of the deity or Idol of Shri Lachmi Narsinghji, but before a certain *dibba*, the contents whereof were neither ascertained nor admitted by the appellant No. 2."

"We accept the appellant's contention that the agreement between the parties recorded on March 30th was, that some sort of oath should be taken. There is nothing on the record to show, and it has not been suggested in argument, that any other form of oath was required except that the defendant should make 'admissions and denials of the list items before the Deity Lachmi Narsinghji.' Both parties clearly intended that such an oath would be binding on them. We have now to consider whe-

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ther such an oath would be binding under S. 11 of the Indian Oaths Act. We believe that it would be so binding, because it would amount to an oath in the proper legal sense of that word. Whatever words or ceremonies are used in imposing an oath, it will be binding, provided it involves in the mind of the witness the bringing to bear of super-human retribution. No words were stipulated for in this case, but the ceremony that was insisted on was that the statements should be made in the presence of the deity, just as in the case quoted from the Allahabad High Court [*Chhedi Lal* v. *Jwala Prasad* (1)] the statement was to be made while Ganges water was held in the hand, and in the Madras case [*Vasudeva Shanbog* v. *Naraina Pai* (2)] the statement was to be repeated thrice in the presence of the idol. The appellant's learned Counsel has strongly argued that in every case to which reference has been made, a form of words or invocation to the deity was used in addition to some ceremony We are not satisfied that in the cases quoted there was any verbal invocation to the deity. The reports of the decisions do not make it clear that it was so. But, even if there was a definite invocation in some form of words in each of these cases, we are of opinion that it must only have been because this was part of the agreement between the parties, and not because it was one of the essentials of an oath. Our authority for this conclusion has been given earlier in this judgment, and may briefly be summed up in the *dictum* of Mr. Justice Ashburn already quoted that the purpose of the oath is not to call the attention of God to the witness, but the attention of the witness to God. The attention of the witness to God in this instance was called in the first place by the agreement that the admissions and denials were to be made before the deity, by the appointment of a Commissioner by the Court to take the statements in the presence of the deity, and lastly by the formal proceedings carried out in the plaintiff's house before the *dibba* of Lachmi Narsinghji."

"We have next to deal with the argument adduced on behalf of the appellant that the deity was, as a matter of fact, not present in the box". "There is no affidavit to the effect that the deity was not in the box. All that we have to go on is that the plaintiff's Counsel said in this Court that he was authorized to state that the box did not contain the deity. Now this is reducing the whole of the proceedings to a farce. The plaintiff does not know any more than we ourselves know whether the deity was present in the box or not. All that is important for the present case is that he believed it to be present, when these denials and admissions were made and the defendant believed it to be present, and the whole of the proceedings were based on the belief held by the plaintiff and the defendant that the deity was present."

"In our opinion, therefore, it is fully proved that the statement made by the defendant before the *dibba* of Lachmi Narsinghji and recorded by the Commissioner amounted to an oath and are conclusive proof under S. 11 of the Indian Oaths Act against the plaintiff of the matter stated."

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1. (1909) I L R 31 A 315. 2. (1879) I L R 2 M 356.

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"Finally it has been objected that when put on his oath, the defendant denied *in toto* certain sums which he had admitted in detail in earlier stages of the case. Whether he has actually done so it is impossible to decide, without opening up the whole of the proceedings, which were to be finally settled by the admissions and denials of the defendant in the presence of the deity. This we cannot do at this stage because in the view that we have taken of the effect of the oath it would be illegal. Whether the defendant is telling the truth or not, the plaintiffs are bound. The position in such a case is clearly stated in the words of Mr. Justice Walsh recorded in *Kesho Ram* v *Peare Lal* (3):

'If the defendant tells an untrue story, the plaintiff is then in a position to prosecute him for perjury which he could not do before, and, in addition to that, the defendant has run the risk of being visited in this world, and the next, by such punishment as he believes his God prepares for those who take a false oath'."

The plaintiffs appealed to His Majesty in Council.

De Gruyther, K. C. and *Hyam* for appellants.

Dunne, K. C. and *Dube* for respondents.

17th May, 1927. The Judgment of their Lordships was delivered by

Lord Blanesburgh.

LORD BLANESBURGH:—This appeal arises out of a partition suit which has been pending in the Court of the Subordinate Judge of Lucknow for a period of nearly 12 years. The plaintiffs and defendants are, in each case, father and son, all members of a Hindu family governed by the Mitakshara School of Hindu law and at one time joint. The first plaintiff is the elder brother of the first defendant. The sons, being both of them infants during the greater part of the critical period, do not, except for one incident concerning the second plaintiff, enter into the story. It will be convenient, therefore, frequently throughout this judgment to refer to the respective fathers as if they represented the entire interest on either side. When their Lordships refer to them as plaintiff or defendant they will do so in this sense.

The family owned property, both moveable and immoveable, of considerable extent and value, including a banking and pawn-broking business. Some time in 1914 the first plaintiff left the family house, not, as has been found, on account of any differences with the first defendant, but because of illness. Subsequently, however, differences arose between the brothers, so acute that the resumption of joint residence was apparently regarded by both as impracticable. It was in these circumstances that this suit for the partition of the entire family pro-

3. (1923) 21 A L J 209.

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perty, including that relating to the business, was commenced on the 23rd September, 1915. It has been proceeding ever since.

To the plaint are attached lists, particularizing the properties to be partitioned. These included the immoveable properties, the debts due, and the gold and silver ornaments pledged to the firm, together with brass and silver articles and other moveables in possession of the parties.

In the plaint it is also alleged that in *kothris,* in the family dwelling-house, there had been locked up by the first defendant joint property in the shape of jewellery and cash, and also ornaments pledged to the firm. These articles the plaintiff could not completely specify, but he claimed that with any other joint property later discovered they should be included in the suit. The existence or non-existence of this property so referred to is the dispute which has mainly led to the altogether inordinate prolongation of the proceedings.

At first it seemed that there would be no serious difference on any question. On the 31st January, 1916, there were filed in Court two petitions for compromise, intimating the intention of the brothers to partition the immoveable property amicably out of Court, and praying that a Commissioner of partition should be appointed to divide the moveables. On that day a preliminary decree of partition was made. Peace was in the air, and so far as the immoveable properties were concerned it has not been broken. These were shortly afterwards duly partitioned by mutual agreement, and no further question arises with reference to them.

But with regard to the moveable property disputes were resumed and became highly embittered. The first defendant denied possession of any such further property as had been referred to in the plaint, and contested many payments alleged by the plaintiff to have been made on the joint account. The proceedings before the Commissioner were interrupted by proceedings in Court; there were several interlocutory orders; some of these were carried to appeal. The first plaintiff was examined and cross-examined in Court for nine days; the first defendant, called by the plaintiff, for 33 days. On the 6th May, 1921, the learned Subordinate Judge delivered a judgment in which, in a sense very unfavourable to the first defendant, he reviewed the history of the protracted litigation up to that date. The first defendant, he found, was in possession of

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and had not discovered moveable properties of very considerable value, and he made an order in the following terms:—

"I therefore order that the Commissioners will find out from the statements of [the first plaintiff] and his wife the special items of properties and their value. Any property on which the Commissioners can identically lay their hands will be taken in possession by them. The value of such property will be determined from the evidence of the first plaintiff and his wife already on the record and by obtaining expert opinion if necessary. Such of the properties as are not forthcoming will be valued so far as possible from the evidence contained in the statements of [the first plaintiff and his wife]. The value of them to the extent of the plaintiffs' share shall be debited against the share of the defendants to be arrived at as a result of the partition of the entire property which is the subject of the suit."

This was, of course, an order which, in an evidentiary sense, if their Lordships may be permitted such an expression, was highly favourable to the plaintiff, and the defendant appealed against it to the Court of the Judicial Commissioner, but on the 29th August, 1921, his appeal was dismissed as incompetent at that stage. The proceedings accordingly continued on the basis of the order appealed from. Lists and counter-lists were exchanged between the parties; the first plaintiff was further cross-examined for four days between the 28th February, 1922, and the 4th March, 1922, and, as a result of it all, the first plaintiff and first defendant on the 16th March, 1922, appeared before the Subordinate Judge and made the following statements, which were duly recorded by the Judge. The defendant, Jagmohan Das, said:—

"Whatever lists Indar Prasad (plaintiff) gives written with his own hand of the village collections, house rents and other accounts, including Ugahi, I shall accept as true and correct. And I shall admit whatever moveables with their value he says upon his belief remained with me."

The plaintiff, Indar Prasad, said:—

"I shall give written with my own hand to Lala Jagmohan Das whatever the accounts are, including village collections, house rents, Ugahi account, etc., and I shall write with my own hand and verify upon my belief, a list of moveables with their value that remained with Lala Jagmohan Das"

In pursuance of that agreement the first plaintiff, on the 30th March, 1922, filed seven lists, of which six only remain material. These six were all in his handwriting. With the exception of the immoveable property, as to which the dispute was ended, they covered the whole range of the suit. If they were conclusive, as by the agreement of the defendant they

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were to be, they would have secured for the plaintiff a decree for practically the whole of his claim and there would have been due to him from the defendant a sum exceeding two lakhs of rupees.

But, then, a strange thing happened. For some reason unknown—the Subordinate Judge describes it as "a fit of responsive generosity" on the part of the first plaintiff, he on the 30th March, 1922, when filing his lists, made in Court, in the presence of the first defendant, the offer on which everything now turns. It is thus recorded by the Subordinate Judge:—

"Lala Indar Prasad says he will give up out of his lists such items as Jagmohan Das denies before the Deity Lachmi Narsinghji. Jagmohan Das accepts this."

It would appear that, unexpected though the first plaintiff's offer must have been, the first defendant was not slow to see the advantage which this agreement gave him, and a few days later he took a further step to make it completely effective. The first plaintiff's son and co-plaintiff had recently attained majority, and on the 4th April, 1922, the first defendant applied that it should be placed on record whether he also relied or not on the special oath of the first defendant. On the 7th of April the young man appeared in Court. He had already intimated that he, too, rested the matter on the special oath of the first defendant as his father, the first plaintiff, had done, and he replied to the learned Judge, who explained the whole position to him, that he was willing it should be so, even if the first defendant struck out all the items claimed by the plaintiff. "Now," comments the Judge, "both the plaintiffs were within the eagle claws of the defendant No. 1."

On the 8th April, 1922, the Commissioner, appointed by the Judge in terms to be referred to later, went to the plaintiff's house, and in a *kothri* of the family deities and in the presence of the *dibba* known as Lachmi Narsinghjika Dibba he recorded the admissions and denials by the defendant Jagmohan Das of the items in the lists filed by the plaintiff.

On the 10th of April the Commissioner submitted to the Court his report of the proceedings, together with the first defendant's recorded statement. Plaintiff No. 2 had indeed been taken at his word. By admitting, as the Judicial Commissioners put it, practically all the items which involved any liability on the part of the first plaintiff, and denying practical-

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ly all the items which involved any liability on his own, the first defendant had transformed lists which disclosed an indebtedness of over two lakhs from him to the plaintiff into a bill ultimately adjusted at Rs. 93,672-15-3 due by the plaintiff to himself and his son.

The plaintiff, now thoroughly alarmed, on the 11th April protested to the Subordinate Judge that the proceedings of the 30th March, 1922, and anything done thereunder, were not warranted by the Indian Oaths Act (X of 1873); that the first plaintiff's offer of that day was vague and indefinite in its wording and did not contemplate a total denial of some of the lists as recorded by the Commissioner; that the denial by the first defendant of the possession of any joint family property —this he had done—was opposed to the Court's finding in its judgment of the 6th May, 1921, and that the denials showed that the first defendant had taken undue advantage of the offer of the first plaintiff, and that the Court should not consider the result to be binding and conclusive on the plaintiff.

After a full hearing the learned Subordinate Judge, on the 22nd May, 1922, declared that the admissions and denials of the first defendant recorded in the presence of the deity Lachmi Narsinghji stood good, and he directed the Commissioner to make a report of the net result of all that had gone before. This report the Commissioner made on the 6th July, 1922, and thereon a final decree was passed on the 25th July, 1922, awarding, as to the moveables to the defendant the above sum of Rs. 93,672-15-3 with future interest on that amount from decree until realization. The plaintiff appealed to the Court of the Judicial Commissioner, which by its judgment of the 10th March, 1924, upheld the decree of the Subordinate Judge. The plaintiff's present appeal is from that judgment.

Their Lordships have been at pains to set forth in some detail the facts which have led to the existing situation. They recognize that the appellants, by their own act, have completely thrown away the favourable position which in this litigation they had obtained for themselves by the order of the 6th May, 1921—a position which may well have induced the first respondent's concessions of the 16th March, 1922. Accordingly their Lordships have thought it right, before proceeding further with the consideration of this appeal, to assure themselves that the appellants had, to the full extent alleged, become bound by the agreement of the 30th March, 1922.

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Their Lordships were, in the light of the earlier proceedings in the suit, particularly struck by one feature of that agreement as interpreted by the Courts in India. As so interpreted it binds the plaintiff by the special oath of the first defendant, not only to matters which were directly within the first defendant's own knowledge—for example, as to the jewellery, cash and ornaments retained by him—but even to matters immediately within the knowledge of the first plaintiff and testified to by himself, and only at second hand, if at all, within the knowledge of the first defendant. To their Lordships' minds this seems, in the circumstances, a strange arrangement for the first plaintiff to have offered the first defendant, and they have scrutinized very narrowly the terms of the recorded agreement to see whether such is its effect, or whether it could not fairly be interpreted as directed, for example, to the plaintiff's list numbered 1, which comprised the property of the first-class, and as excluding, for example, list numbered 3, which recorded the first plaintiff's own transactions. But, on full consideration, their Lordships are, in this matter, constrained to adhere to the view of the agreement taken by the Courts below. It was common ground between the parties there that the recorded statements of the 16th March and the 30th March, 1922, were to be read together. So read these statements relate to all, and not to some only, of the plaintiff's final lists which as has been said covered the whole range of the suit. There is no room for any discrimination in either statement, each of which the Board must assume to be correctly recorded. Their Lordships accordingly must conclude that if the agreement of the 30th March, 1922, is effective for any purpose at all it is effective to the fullest extent of the six lists, so that the result in figures arrived at on that footing must inevitably follow.

But it is, however, contended by the appellants that, however the agreement be construed, they, for two separate and distinct reasons, are no longer bound by it. The first reason is that it has not been observed by the first defendant. The second is that the statements made by the first defendant and recorded as above set forth are not, as a result of defects in procedure, made binding upon the appellants by the Indian Oaths Act, 1873.

As to the first contention, it is said that in two respects the agreement was not observed by the first defendant in the pro-

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ceedings before the Commissioner of partition. First of all, it is asserted, the Deity was not present on that occasion. His *dibba* was in the *kothri*, but the Deity was not himself within it To this assertion their Lordships can give no countenance. It was indeed only faintly made before them, although apparently strongly urged in the Court of the Judicial Commissioner. It cannot survive examination. The Deity in question was the family Deity of the plaintiff; the proceedings took place in the first plaintiff's presence in a *kothra* of the Deities in his house; the *dibba* of the Deity was there by the first plaintiff's own direction; he knew exactly what the first defendant had to do, because he himself had dictated the procedure; he made no objection at the time to any irregularity or omission; he and the first defendant acted as if they both believed, as their Lordships cannot doubt they did, that the Deity was present in the *dibba*. If, to the knowledge of the first plaintiff, the Deity was not so present, the whole proceeding was reduced to a farce, if not to something worse. There is, however, no affidavit or sworn statement by the first plaintiff or anyone else that the Deity was not actually present. The point was not, it seems, taken at all before the Subordinate Judge. It appears for the first time on the 3rd October, 1922, in the plaintiff's grounds of appeal to the Court of the Judicial Commissioner. Like that Court, their Lordships are unable to countenance the suggestion, which was, they think, to say the least of it, ill advised on the part of the plaintiff.

But there is, it is alleged, another respect in which the agreement was not observed. It was thereby contemplated, so it is said, that the Deity would be actually invoked by the first defendant when he attended to make in the presence of the God his admissions and denials. And no such invocation was made. The agreement, therefore, say the appellants, has not been performed in an essential particular. Now it is the fact that on the occasion in question there was no invocation of the Deity. It is not, however, true to say that the agreement made between the parties called for any such invocation. Their Lordships feel no doubt that the actual proceedings before the Commissioner amounted to a literal compliance with the terms of that agreement. And a substantial compliance also. For their Lordships are of opinion that the learned Subordinate Judge correctly interprets the views on this sub-

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ject both of the plaintiff and defendant when he says that "the very presence—

of the god or idol on the spot when the statement was made, so to speak, within his sight and hearing was tantamount to his invocation by name in case of his absence. When the god or idol had been brought purposely on the scene to witness the statement of defendant 1, it was by no means necessary to call upon him to bear witness, for having been brought to the scene he could not be suspected to be inattentive or asleep."

The first objection therefore fails in both respects.

The second objection may be expanded thus: apart from such an invocation as has just been referred to and which was never made, and in the absence of anything done on the occasion that could properly be described as the administration to the first defendant of an oath or affirmation in the ordinary sense of these words, his admissions and denials are not, within the Indian Oaths Act, 1873, binding on the plaintiffs. As an aid to the consideration of this objection, which is much more formidable than any of the others, it will be convenient to set out, for facility of reference, the sections of the Indian Oaths Act, 1873, on which its determination must mainly turn.

The sections are the following :—

"5. Oaths or affirmations shall be made by the following persons:—

"(a) All witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or persons having by law or consent of parties authority to examine such persons or to receive evidence;

"(b) interpreters of questions put to, and evidence given by, witnesses, and

"(c) jurors.

"Nothing herein contained shall render it lawful to administer, in a criminal proceeding, an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

"6. Where the witness, interpreter or juror is a Hindu or Muhammadan,

"or has an objection to making an oath,

"he shall, instead of making an oath, make an affirmation.

"In every other case the witness, interpreter or juror shall make an oath.

IV. FORMS OF OATHS AND AFFIRMATIONS.

"7. All oaths and affirmations made under section five shall be administered according to such forms as the High Court may from time to time prescribe.

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"And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use . . . . . .

"8 If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him

"9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section eight, if such oath or affirmation is made by the other party to, or by any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation:

"Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

"10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a Commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

"11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated."

The judgment of the learned Subordinate Judge makes a careful record of the Indian authorities on this subject. The result of them, their Lordships are inclined to think, is that the point now raised has not so far been the subject of express decision. Safe, however, it is to say, that in the decisions which have been brought to their Lordships' notice where a so-called "special oath" has been upheld there is no clear indication one way or the other, whether the person who took that oath recited any formula by way of invocation, or did anything else which in the ordinary sense of the words amounted to the making of an oath or affirmation. The question, accordingly, now that it has been raised must be determined on principle, and to this task their Lordships proceed.

It is not denied that the statements made by the first defendant here in the presence of the Deity were specially binding on his conscience by reason of the fact that they were so made. It is also recognized that the Subordinate Judge before he appointed a Commissioner was himself satisfied that the particular ritual to be followed fulfilled the conditions of S. 8 of the Act. Equally clear is it that the learned Judge

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intended to act in pursuance of S. 10, when on the 30th March, 1922, he made this order of appointment:—

"With the consent of parties I appoint Babu Mahesh Prasad, pleader, for going with the plaintiff's list before Lachmi Narsinghji in plaintiff's house and take defendant's admissions and denials of the list items before the deity."

The question, therefore, is whether the evidence of the first defendant, given in the presence of the Commissioner before the Deity, was, in these circumstances, evidence on oath or solemn affirmation administered by the Commissioner within the meaning of Ss. 8, 9 and 10 of the Act, and their Lordships, in agreement both with the learned Subordinate Judge and the Judicial Commissioners, are of opinion that this question must be answered in the affirmative. In their judgment, upon a sound construction of the sections, neither an invocation nor an oath or affirmation in the technical sense of these words is in any way an essential part of the so-called oath or solemn affirmation referred to in S. 8 of the Act.

Their Lordships are led to this conclusion by reference to the sections alone. They are confirmed in it, however, by recalling the stage of development which the law of India had reached on the subject of oaths by the date when the Act came into force.

Upon the point of construction the cardinal consideration to note is that the "oath or solemn affirmation" referred to in S. 8 and following sections is something quite distinct from the oaths and affirmations referred to in S. 5. These are to be in such form as the High Court shall prescribe (S. 7). With regard to the oath or solemn affirmation referred to in S. 8, however, all that is said is that it may be "in any form common amongst or held binding by persons of the race or persuasion to which (the deponent) belongs and not repugnant to justice or decency." That is to say, it may be as infinite alike in form and contents as racial custom or the dictates of any religious persuasion may, within the prescribed limits, sanction or require. But from its very nature and essence it can never be in any part of it dependent upon the direction or dictation of the High Court or of any other extra-racial or secular administrative authority. It would or might at once lose its essential distinctive sanction if any such outside interference were permitted to have effect. And this brings their Lordships to the second matter which it is necessary to note in the construction of these sections. There is no suggestion either in Ss. 8, 9 or

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10 that when the separate "oath or solemn affirmation" is permitted the ordinary oath or affirmation, as prescribed, or any part of it, is to be administered as well. The "oath or solemn affirmation" when permitted is a complete substitute for the other. There is in the sections no warrant for the suggestion that any part of a procedure which, be it remembered, is only appropriate where it is gone through before any evidence at all is given, and is designed to cover that evidence when given, is to be transferred to a taking of evidence which, as in the present case, is solemnized only by its being given, and while it is given in the actual presence and hearing of the Deity himself.

Indeed, this case shows that such a requirement, not, their Lordships think, made by the sections, would in many cases be entirely out of place. When, as here, the whole meaning of the procedure is that a statement made by a witness in the corporeal presence and hearing of his God will be true by reason of the fact that it is so made, introductory words of invocation, appropriate enough in other circumstances, become entirely unsuitable. For if the Deity be removed before the statement is made the words are nugatory; if the statement be made in his presence they are superfluous.

It is said further, however, that this construction of the sections attaches no adequate signification to the words "oath or solemn affirmation" in S. 8. Their Lordships, on consideration, do not agree. It appears to them that the use of the alternative expression "oath" and "*solemn* affirmation" as a description of the special ritual envisaged in S. 8, is intended to indicate that the ritual is to be at least as solemn for the deponent and attended by the same consequences to him as is an ordinary oath or affirmation for and to an ordinary witness. The words, their Lordships opine, were selected primarily to put it beyond the possibility of doubt that the temporal consequences of corrupt falsehood would follow as inevitably for the one class of witness as for the other: they are descriptive of the nature and result of the ritual: they are in no way concerned with its form—a conclusion which is confirmed by the consideration that historically an affirmation, technically so called, is merely a substitute for an oath: that the description includes both "oath" and "affirmation," although, except in the quality of solemnity these are quite distinct, the one from the other, and that its purpose is revealed by the addition to the word "affirmation" of the adjective "solemn," which is not in

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use in connection with affirmations in the technical sense of the word.

But, lastly, it is said that the "oath or solemn affirmation" must, as appears from S. 10, be something which either the Court or a Commissioner appointed by the Court can "administer" to the witness; it must, under S. 8, be something that can be "tendered" to him. Upon this it is to be remembered that "administer" is, in the law, a word of wide and not of restricted import. It would be for instance beyond question that an oath is "administered," not only where the English form is adopted, but where, in the presence of the Court, it is "taken" by the witness in the Scottish form. Their Lordships do not doubt that the terms of the section were here in this respect fully complied with when the admissions and denials of the first defendant were made, not only before the Deity, but in the presence of the Commissioner. The word "tendered," in S. 8, does not appear to their Lordships to create any difficulty.

On construction alone, therefore, their Lordships reach the same conclusion as the Courts below. That conclusion is, however, in their judgment, confirmed by a reference to the course of development of the Indian law on this subject. That law was derived from the English law, with some modifications suggested by Indian conditions. Just as in England, so also in India, it was at one time the rule that there could be no evidence without an oath in the strict sense of the word, and only gradually were exceptions grafted by statute upon that rule. Prior to 1840 the privilege of making an affirmation instead of taking an oath was enjoyed only by Quakers, Moravians and Separatists. By that time it had been found that the taking of an oath was highly objectionable to Hindus and Mahomedans, and Act V of 1840 was passed for the purpose of prohibiting the administration of oaths to persons belonging to those communities, a form of affirmation being substituted for an oath. With some extension in 1869 the law so remained until the Act VI of 1872 was passed. By that Act it was provided that every witness who objected to take an oath might instead make a simple affirmation, and in section 4 will be found the statutory provision which, prior to 1873, enabled volunteers to make oaths in special cases. Sections 8 to 13 of the present Act of 1873 correspond to and have taken the place of that section, and their Lordships can have no doubt that long before that time the Indian view, embodied afresh in

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the Act, had come to be that which may, briefly, be taken from the words of the Lord Chancellor in *Omychund* v. *Barker* (1) and quoted by the Judicial Commissioners:—

"The next thing is the form of the oath It is laid down by all writers that the outward act is not essential to the oath. It has been the wisdom of all nations to administer such oaths as are agreeable to the notion of the person taking."

For all these reasons their Lordships dealing on this branch of the Appeal with the one aspect of the matter brought before them by the appellant for consideration are constrained to agree with both Courts in India that the statements made by the first defendant in the presence of the family Deity and before the Commissioner were conclusive upon the plaintiff.

An objection was taken by the appellants to certain items in the accounts which their Lordships at the hearing intimated that they could not entertain for reasons which they then gave. They do not repeat these reasons. In their Lordships' judgment the order of the Judicial Commissioner objected to was in all respects right, and they think that this appeal should be dismissed with costs.

And their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Barrow, Rogers* and *Nevill.*

Solicitors for respondents: *T. L. Wilson & Co.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of Sind.]

PRESENT :—VISCOUNT SUMNER, LORD SINHA, LORD BLANESBURGH AND SIR JOHN WALLIS.

The Firm of Saleh Mahomed Umer Dossal ... *Appellants**

v.

Seth Nathoomal Kessamal ... *Respondent.*

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Firm of Saleh Mahomed Umer Dossal v. Seth Nathoomal Kessamal.

Award—Bad on face of it—Error in law—Contract incorporated into award.

Parties who submit their disputes to arbitration are bound by the arbitrator's conclusions in point of law or of fact.

An arbitrator is guilty of judicial misconduct if he makes a mistake of law visible on the face of his award.

But the error in law must be distinctly collected from the face of the award or from some document incorporated into the award.

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*P. C. Appeal No. 7 of 1926. 5th May, 1927.

1. (1744) 1 Atk. 22.

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Where an award recites a contract, but only for a particular purpose, namely, to earmark the disputes referred to arbitration, the contract does not thereby become a document forming part of the award.

Champsey Bhara and Co v. *Jivraj Balloo Spinning and Weaving Co., Ltd.,* (1923) I L R 47 B. 578: 44 M L J 706 (P C) followed.

Judgment of the Judicial Commissioners reversed.

Appeal (No. 7 of 1926) from the Court of the Judicial Commissioner of Sind.

In this case there was a dispute between the present appellants Saleh Mahomed Umer Dossal and the present respondent Seth Nathoomal Kessamal in respect of a consignment of certain bales of newspapers. In consequence of that dispute, parties went to arbitration and the arbitrators having disagreed, the matter was referred to an umpire, who published an award directing Seth Nathoomal Kessamal to pay Rs. 29,000 odd with interest and costs.

Seth Nathoomal Kessamal applied to have this award taken off the file but his application was rejected by a Judge of the Judicial Commissioner's Court, Sind.

The respondent (Seth Nathoomal Kessamal) thereupon preferred a revisional application to the Judicial Commissioner's Court, which application was heard by Messrs. Kemp and Kennedy, and the learned Judges, forming the opinion that the umpire had committed an error of law patent on the face of the award, ordered the award to be taken off the file. The present appellant Saleh Mahomed Umer Dossal then applied to the Judicial Commissioner's Court for review of judgment, which came up for hearing before Mr. Kennedy, sitting alone, Mr. Kemp having, in the meantime, ceased to be a Judge of that Court. The learned Judicial Commissioner held that there were no sufficient grounds for a review, and the application was rejected.

Saleh Mahomed Umer Dossal appealed to His Majesty in Council from the judgment of Messrs. Kemp and Kennedy ordering the award to be taken off the file.

The material facts appear from the judgment of the Judicial Committee.

Sir George Lowndes, K. C. and *E. B. Raikes* for appellants.

The respondent was not represented at the hearing.

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5th May, 1927. The Judgment of their Lordships was delivered by

VISCOUNT SUMNER :—In this case as the respondent did not appear, their Lordships with the very full assistance of Counsel for the appellants have examined it with, as they believe, every care to see whether there is any irregularity, or other matter than that which has been fully argued, to which their attention ought to be directed, but they are satisfied that the only question which can reasonably be raised is whether the Court of the Judicial Commissioner, from which the appeal comes, were or were not right in their decision that the award made in the arbitration between the present parties was bad on its face. Though it was no part of the proceeding now before the Board, it is the case that after the issue was decided, that is now under appeal, the present appellants applied to have it reviewed, and on that occasion one of the members of the Court, whose judgment is under appeal, said, in refusing the application:—

"It may be admitted for the present purposes, that our decision proceeded largely on the same grounds as those that commended themselves to the High Court of Bombay in *Jivraj Balloo Spinning and Weaving Company, Limited.* v. *Champsey Bhara and Company* (1). Those grounds did not commend themselves to their Lordships of the Privy Council, and the judgment of the High Court of Bombay was reversed. That judgment of their Lordships of the Privy Council was delivered on the 6th March, 1923, and at the time we heard the revisional application in question it had not reached India. It may be assumed for present purposes that, had that judgment been placed before us at the hearing our judgment would not have proceeded on the lines on which it did proceed."

It is therefore perfectly plain, that the one point which was in dispute in the Court below was, whether or not under the circumstances of the case there could be said to be an error upon the face of the award, which had been brought before them by the regular process of objection on the part of one of the parties to the award, when filed.

The contract is referred to in the award. It recites a contract made between the parties dated the 1st December, 1919, but it does so for one purpose only, namely, to earmark the disputes, which had arisen and which, by a subsequent written reference, had been referred first to the arbitration of two named arbitrators, and then, in the event which happened, of the umpire, who made the award when they differed. The umpire recited that both parties were present on every occasion

1. (1919) I L R 44 B 780.

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when he sat; that he considered all the evidence, documents and accounts before him and the arguments of the pleaders, and then made the award. Paragraph 1 of his award adjudged that one party should pay a named sum with interest at a fixed rate, and from dates which were fixed also and then with the costs of the arbitration. Paragraph 2 stated that on receipt of these amounts the other party should forthwith deliver certain goods, which were precisely specified. Paragraph 3 provided for a right to require payment of storage charges, if there was delay in taking delivery, and the amount of the arbitration costs was then specified as well. There was also a clause, which stated that in addition to these costs, all costs, if any, incurred in filing the award in Court should be paid. That clause is a severable matter and was treated by the first Judge as a mere indication of opinion for his guidance and not as part of the award, and when afterwards the award came to be questioned before the full Court, no exception was taken to his decision on this ground, which therefore stands. The exception taken to his decision simply had reference to specific objections and left the award in other respects standing. It was that the umpire had been guilty of that particular form of judicial misconduct, which consists in making a mistake in law, and letting it be visible on the face of his award. The argument was that the contract was incorporated into the award by the reference mentioned above, and that, adopting the parties' admission that the bales tendered were of substantially less weight than the bales whose deliverable weight was specified in the contract, the award must be taken to have disclosed on its face an error in law in construing the terms of the contract, which related to the description of the goods sold and to the law applicable to the sale and delivery of goods by description. Their Lordships, independently of the case of *Jivraj Balloo Spinning and Weaving Company, Limited* v. *Champsey Bhara and Company* (2) could not have entertained that view, because it appears to them quite plain that this award, the terms of which are very precisely stated, makes its allusion to the contract very guardedly and for the purpose only of earmarking the origin of the dispute in question. It is perfectly consistent with the umpire's having come to conclusions of law or of fact of his own, by which the parties who submitted their disputes to him would

2. (1923) A C 480.

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be bound. On looking at the previous decision of the Board, however, it may be observed that that was a stronger case than the present one, because in that case there had been a rejection of the goods altogether, a fact which was referred to in the award. By this and other exceptional references to the contracts, the award incorporated their written terms, and the rules and regulations, subject to which they were made; and the letters between the parties, stating the grounds on which the goods were rejected, were also mentioned and included. It then proceeded to state how the arbitrators got at their conclusion. On these facts the decision of the Board was that there was nothing that could be called error upon the face of the award, and therefore, the appeal succeeded. *A fortiori* this appeal must succeed also.

Their Lordships think it unnecessary to canvass the case any further. They will humbly advise His Majesty that the appeal be allowed with costs, and the decision of the first Judge be restored.

Solicitors for appellants : *Watkins* and *Hunter.*

Solicitors for respondent : *T. L. Wilson and Co.*

K. J. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT :—LORD ATKINSON, LORD CARSON, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Maung Sin ... *Appellant**

v.

Ma Tok ... *Respondent.*

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Decree—Construction of—Execution—Limitation—Annual payments —Possession on default—Time at which right to possession arose—Indian Limitation Act (IX of 1908), *Sch I, Arts.* 181, 182, *cl.* 7.

A decree, in terms of an award, in plaintiff-respondent's favour, provided that certain properties were to remain in possession of the defendant-appellant "who will pay to the plaintiff annually the sum of Rs. 2,000 in the month of Kason, on default of payment of the same (Rs. 2,000 annually) the said properties will be made over to the plaintiff."

The respondent applied in 1924 to execute the decree in respect of non-payment for 1923 and 1924 and also by delivery of possession of the properties. There was no certificate under O. XXI, R. 2 of any payments for the years before 1923.

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* P. C. Appeal No. 68 of 1926. 31st March, 1927.

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Held, that upon the true construction of the decree each instalment as it became due was a claim originating under the decree from the date when such claim arose, and that the provisions of clause 7 of Art. 182 of the First Schedule to the Limitation Act therefore applied, and that the claim to the lands was not time-barred.

Decree of the High Court affirmed on a different ground.

Appeal from a decree of the High Court (Heald and Pratt, JJ.) sitting at Mandalay reversing a decree of the District Court of Sagaing.

Dunne, K. C. and *L. R. Dunne* for appellant.—The decree cannot be read as a series of decrees operating in successive years. The first default gave rise to the right of possession.

S. Moses for respondent was not called upon.

31st March, 1927. The Judgment of their Lordships was delivered by

Lord Carson

LORD CARSON :—The respondent, who is the wife of the appellant, on the 30th September, 1916, obtained a decree in the District Court of Sagaing in terms of an award which had been previously made by which certain properties contained in a list attached to the award and the decree were to be left in possession of the appellant (defendant), who was to pay to the respondent (plaintiff) annually a sum of Rs. 2,000 in the month Kason, or in default of payment of the same (Rs. 2,000 annually) the said property contained in the said list would be made over to the plaintiff-respondent. It appears that after the making of the decree the parties lived together until the year 1923, when they separated.

On the 8th October, 1924, the respondent filed an application in the District Court of Sagaing for execution of the decree against the appellant in default of payment of two instalments of Rs. 2,000 each for the years 1923 and 1924 respectively, and claimed, as the judgment-debtor failed to pay according to the decree, that the Court might direct the delivery of the lands in the said list by the judgment-debtor to the decree-holder, the respondent.

The respondent also filed an application rendering an account of the sums alleged to have been received by her, in pursuance of the decree, up to May, 1922, and requesting that this might be noted in Court. The appellant, however, denied that he had ever made any annual payments, and pleaded that the execution of the decree was time-barred, and also alleged that even if the payments had been made, they could not be

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recognised by the Court because they had not been certified within the time limit of the Court under O. XXI, R. 2.

The learned District Judge before whom the case was first tried held that as the payments alleged, even if made, had not been certified, they could not be recognised by the Court, and that therefore, as no payment had been made from the date of the decree to the date of the claim for execution, such claim was barred by the Indian Limitation Act.

The High Court, however, decided that, having regard to the provision of Clause 7 of Article 182 of the First Schedule of the Limitation Act, no question of limitation could possibly arise, and that as failure to pay these two instalments was admitted, the respondent was entitled to execution in respect of them; and they also held that the respondent was entitled to execute the decree for the two annual payments, Rs. 2,000 each, and also, as she claimed, possession of the property to which the decree referred. The question as to whether the alleged payments during the intervening years between 1916 and 1923 were, in fact, paid, or were to have been taken as paid according to the evidence given, was discussed and considered at some length in the High Court, as was also the question of whether the claim of the respondent to have such payments certified was barred by time-limit. In the view, however, which this Board takes of the construction of the original decree, their Lordships think that it is unnecessary to pronounce any opinion upon the question of the application of the Limitation Act to the certification of the payments, or as to the effect of the absence of such certification. Their Lordships are of opinion that upon the true construction of the decree each instalment as it became due was a claim originating under the decree from the date when such claim arose, and that the provisions of Clause 7 of Article 182 of the First Schedule to the Limitation Act therefore applied.

It was contended, however, on behalf of the appellant at the hearing before their Lordships that even if a decree could be made for the annual payments due in 1923 and 1924, nevertheless the respondent was not entitled in default of each payment to have the property mentioned in the decree made over to the respondent, the argument being that, as no claim was made to the possession of such property on default of payment during the early years after the decree, time commenced to run

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from the date of the earliest default, and the claim to the land was therefore time-barred.

Their Lordships cannot agree with this contention. They are of opinion that upon the construction of the decree itself, on the occasion of a default in each payment the right of the respondent to have the said property made over to her arose, and therefore the claim to the lands was not time-barred.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant : *Bramall and Bramall.*

Solicitors for respondent : *T. L. Wilson and Co.*

H. C. ——— *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON AND LORD CARSON.

Soniram Jeetmull (a firm) ... ... *Appellants** *(Defendants)*

v.

R. D. Tata & Company, Limited .. *Respondents* *(Plaintiffs)*.

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Soniram Jeetmull v. Tata & Co., Ltd.

Jurisdiction—Letters Patent, Rangoon, cl. 10—*Cause of action, in part, arising within local limits—Indian Contract Act,* 1872, *S.* 49—*Duty of debtor to make payment where the creditor is.*

S. 49, Indian Contract Act, 1872, has no application to a case where, by manifest implication or necessary import, a place is fixed by the contract for the performance of the obligation. The rule in S. 49 accordingly does not apply where there is an obligation to pay the creditor, and an inference can legitimately be drawn, either from the terms of the contract itself or from the necessities of the case, that there is a further obligation on the debtor of finding the creditor so as to pay him.

Quaere: Whether the English Common Law rule that, if no place is named, it is the duty of the debtor to make the payment where the creditor is, has been superseded by S. 49, Indian Contract Act, 1872.

Puttappa Manjaya v. *Virabhadrappa,* (1905) 7 Bom. L. R. 993 distinguished.

Bansilal Abirchand v. *Ghulam Mahbub Khan,* (1925) L R 53 I A 58: 49 M L J 806 (P C) and *Motilal Pratabchand* v. *Surajmal Joharmal,* (1904) I L R 30 Bom. 167 referred to.

Appeal (No. 123 of 1926) by special leave from the High Court, Rangoon.

The plaintiffs brought a suit on the Original Side of the High Court, Rangoon, to recover a sum of money from the

*P. C. Appeal No. 123 of 1926 29th March, 1927.

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defendants, who carried on business in Calcutta. The plaintiffs alleged that the cause of action, in part, arose within the local limits of the ordinary original jurisdiction of the High Court, Rangoon, and leave of the Court was duly obtained as required by clause 10 of the Letters Patent, Rangoon.

The sole question before the Judicial Committee was whether a part of the cause of action arose at Rangoon, so as to give jurisdiction to the Rangoon High Court on its Original Side to entertain the suit under clause 10 of the Letters Patent, Rangoon.

The material facts appear from the judgment of the Judicial Committee.

A. M. Dunne, K. C. and *E. B. Raikes* for appellants.

Sir George Lowndes, K. C. and *Preedy* for respondents were not called upon.

29th March, 1927. The Judgment of their Lordships was delivered by

Viscount Sumner.

VISCOUNT SUMNER :—This is an appeal by special leave from the High Court of Rangoon, which affirmed a decision of the Court below, over-ruling an objection to the jurisdiction taken by the appellants. It was imposed upon the parties, as a term of the special leave, that the pleadings between the parties, the judgments and the order of the Court in India should be the sole material for this argument. The appellants were sued in Rangoon by R. D. Tata & Company, Limited, who have a business branch there, for payment of sums of money, due upon the failure of constituents to satisfy debts due to Messrs. Tata, Sons & Company, which sums the defendants had undertaken to make good to them. Judgment had been obtained, and there was no dispute about the amount or validity of these debts or about their being due from the original debtors, but Messrs. Jeetmull, who carry on business in Calcutta, contend that they cannot be sued for this money in Rangoon. The transactions between these parties were a continuation of dealings which had existed for a number of years before the present plaintiffs became an incorporated company and had been carried on under a memorandum dated the 10th December, 1911, and signed in Calcutta. It is clause 2 of that contract that expresses Messrs. Jeetmull's obligation to pay in the present case, and it says that Messrs. Jeetmull are to make good any undisputed claims that Messrs. Tata and Company might lose owing to the failure or suspension of pay-

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ment of constituents Accordingly, one point only arises, namely, whether the part of this contract relating to payment was performable by Messrs. Jeetmull in Rangoon. If it was, there was jurisdiction in the Court to entertain the suit and the objection of the appellants was rightly over-ruled.

The point, at first sight, appears to be exceedingly short. It is quite true the contract does not say where Messrs. Jeetmull are to pay, but it does say, by an implication which is indisputable, that they are to pay Messrs. Tata, Sons & Company, and it follows that they must pay where that firm is. Hence one would think that, upon the face of this contract, not indeed in express terms, but by the clearest implication, payment is to be made in Rangoon. In respect of the whole of this business it is not disputed that the business transactions, out of which the outstanding debts arose, took place in Rangoon, and for this purpose the branch of Messrs. Tata, Sons & Company there were the Messrs. Tata, Sons & Company concerned. It was objected, however, in the High Court of Rangoon, that this constituted an importation of a technical rule of the English Common Law into the jurisprudence of India, namely, the rule that the debtor must seek out the creditor. The simple answer to that would have been that, on the contrary, it was a mere implication of the meaning of the parties. The appellants, however, rely upon S. 49 of the Indian Contract Act, which is in these terms:—

"When a promise is to be performed without application by the promisee and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at such place."

Then it is said that no place was fixed by the contract or prior to the institution of this suit for the performance of the obligation of payment, and no application has been made by the promisor to the promisee to appoint a reasonable place and therefore there is no place of payment. Consequently, this section, which, it is said, replaces any rule of law with regard to the obligation of the debtor to seek out the creditor, has not been satisfied, and so there is no part of the contract, which is performable in Rangoon. The submission seems a strange one. It is quite certain that, if the application had been made, the place appointed would have been Rangoon, and all would then have been well for the plaintiff. Also it is plain that the section makes it the duty of the promisor to apply for the appointment of a reasonable place, a duty which in this case the pro-

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misor has entirely disregarded. It is not easy to reconcile with the ordinary rules of law a construction which enables the promisor to better his position under his contract by neglecting to perform a statutory duty imposed upon him with regard to its performance. The matter, however, is said to be covered by authority in India, and it therefore becomes necessary to consider what the authorities are. They do not appear to bear out the view which has been presented to their Lordships. In 1904, in the case of *Motilal Pratabchand* v. *Surajmal Joharmal and another* (1) Mr. Justice Tyabji held that "where no specific contract exists as to the place where the payment of the debt is to be made, it is clear, it is the duty of the debtor to make the payment where the creditor is." This follows the principle of *Dhunjisha Nusserwanji* v. *A. B. Fforde* (2) where it was held that, "In the absence of stipulation in the contract itself, the intention of the parties to it was to guide the Court in determining the place of its performance," and upon that principle the suit, which was one relating to leave under clause 12 of the Letters Patent, was decided against the jurisdiction of the Bombay Court. Then, shortly after the former of the above cases, in the case of *Puttappa Manjaya* v. *Virabhadrappa* (3) the High Court of Bombay had the matter before it on appeal. No authority whatever appears to have been cited, but, there being an objection that the Court had no jurisdiction to entertain a creditor's suit for recovery of payment from the debtor, Sir Lawrence Jenkins says:—

"This argument rests upon the assumption that the Common Law rule applies that a debtor must seek out his creditor. We think, however, in India the rule as to the place of performance, whether it be payment or any other mode of performance, is to be determined by S. 49 of the Contract Act; and applying that section to the facts of this case, we think, it is impossible to hold that the payment was to be made within the limits of the jurisdiction of the Sirsi Court, for no such application has been made or place fixed as S. 49 prescribes. Therefore we are of opinion that the Sirsi Court had no jurisdiction."

What the contract precisely was does not appear, but the suit was to recover any balance that might be found due on taking accounts with interest, and the facts of that case differ from the facts of such a case as the present. Finally, this Board had the matter before it in 1925, in *Bansilal Abirchand* v. *Ghulam Mahbub Khan* (4) and there, the English rule hav-

1. (1904) I L R 30 B. 167.
2. (1877) I L R 11 B 649. 3. (1905) 7 Bom. L R 993.
4. (1925) L R 53 I A 58; 49 M L J 806 (P C).

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ing been urged in terms upon their Lordships on the one side and Puttappa's case on the other, Lord Blanesburgh for the Board says:—

"There is no promise either by the principal debtor or the surety to make any payment at Secunderabad, and, so far as the principal debtor is concerned, the bond above abstracted is the only promise on his part which is forthcoming. It is quite true that, on failure of any instalment, there is doubtless an implied promise by him to repay the loan. But there is no implied promise to repay it at Secunderabad. Even by British law the duty of a debtor to find and pay his creditor is only imposed upon him when the creditor is within the realm. And the plaintiff has not contended that if there be any such duty at all imposed by Indian law upon a debtor, it extends in this respect further than in England. Accordingly, so far as the principal debtor is concerned, there is no obligation upon him either express or implied to make any payment to the plaintiff at Secunderabad."

Their Lordships do not think that in this state of the authorities it is possible to accede to the present contention that section 49* of the Indian Contract Act gets rid of inferences, that should justly be drawn from the terms of the contract itself or from the necessities of the case, involving in the obligation to pay the creditor the further obligation of finding the creditor so as to pay him. The rule in section 49 is one which it was intended should apply both to the delivery of goods and to the payment of money, to which obviously different considerations apply from those applying in a case like the present, where the question is one of jurisdiction, and their Lordships are satisfied that an intention is shown in the contract that payment should be made in Rangoon. Accordingly, part of the contract was performable in Rangoon so as to satisfy section 49 of the Indian Contract Act, and there was jurisdiction to entertain the suit.

Their Lordships will humbly advise His Majesty accordingly that this appeal should be dismissed with costs.

Solicitors for appellants: *Bramall & Bramall.*

Solicitors for respondents: *Stoneham & Sons.*

K. J. R. *Appeal dismissed.*

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*S. 49 of the Indian Contract Act is apparently a slip for cl. 10 of the Letters Patent, Rangoon.—K. J. R.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Calcutta.]

PRESENT :—VISCOUNT DUNEDIN, LORD PHILLIMORE, LORD WARRINGTON OF CLYFFE, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Sri Protap Chandra Deo Dhabal Deb ... *Appellant** (*Defendant*)

v.

Raja Jagadish Chandra Deo Dhabal Deb ... *Respondent* (*Plaintiff*).

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Sri Protap Chandra Deo Dhabal Deb *v.* Raja Jagadish Chandra Deo Dhabal Deb.

Impartible estate—Alienation by will—Proof of family custom—Right to maintenance—Mesne profits—Personal liability of wrongdoer for.

In impartible property there is no co-parcenary. In the absence, therefore, of a family custom restricting alienation, an impartible estate is alienable by will.

The *onus probandi* is on the party alleging the existence of such a custom

Sartaj Kuari v. *Deoraj Kuari* (1888) L R 15 I A 51: I L R 10 All 272 (P C) and the First Pittapur Case (1899) L R 26 I A 83 : 9 M L J Sup 1 (P C) followed.

Baijnath Prashad v. *Tej Bali Singh*, (1921) L R 48 I A 195. 40 M L J 387 (P C) distinguished.

The decisions of the Privy Council in Sartaj Kuari Case and the First Pittapur Case are not inconsistent with Baijnath's Case and other judgments of the Board dealing with the right of succession to an impartible estate.

The mere circumstance that no previous holder of the impartible estate had purported to alienate it by will cannot be accepted as proof of a custom of inalienability.

Apart from custom and relationship to the holder, the junior members of the family have no right to maintenance out of an impartible estate.

The Second Pittapur Case, (1918) L R 45 I A 148: 35 M L J 392 (P C) followed.

The personal liability of a wrongdoer to pay mesne profits is not affected by the circumstance of his poverty.

Consolidated Appeals (No. 59 of 1925) from a judgment and decree of the High Court, Calcutta (20th June, 1924) affirming a decree of the Subordinate Judge, First Class, Midnapore.

The plaintiff Jagadish Chandra Deo Dhabal brought this suit for recovery of possession of the Dhalbhum Raj Estate situate partly in Singhbhum and partly in the District of Midnapore. He claimed the estate, under a will of Raja Satrughna Deo Dhabal, dated 11th May, 1905, from the defendant Protap Chandra, who was the testator's nearest heir. The

*P. C. Appeal No. 59 of 1925. 3rd May, 1927.

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parties were admittedly governed by the Mitakshara School of Hindu Law. The estate had been held from the time of remote ancestors as a joint ancestral impartible Raj. Satrughna died joint in estate with the defendant (Protap Chandra), and if it were ordinary ancestral property there was no doubt that the defendant would have taken the estate by survivorship.

The Dhalbhum Raj is an impartible estate the succession to which has devolved by family and local custom according to the rule of lineal primogeniture from ancient times. The estate was settled by the British Government with Raja Jagannath, the ancestor of the parties, at a revenue of Rs. 4,000 in 1777. Raja Satrughna got the Dhalbhum Estate according to the ancient family and local custom. On his death in March, 1916 disputes arose as to the succession to the estate between the plaintiff and the defendant. The present suit was instituted on the 17th March, 1921. It was found that the defendant was joint in estate with Raja Satrughna, so that if there was no power of alienation, the defendant was entitled to succeed by right of survivorship. The defence, *inter alia,* was that the Dhalbhum Estate was by its nature inalienable, and the defendant denied that the proprietor for the time being of the Estate had any right to dispose of any of the properties of the Estate by will or otherwise. The Trial Court held that the Estate being an impartible one was alienable and that the defendant had failed to prove that either by custom or by its nature it was inalienable, and in the result the plaintiff's suit was decreed. The defendant appealed to the High Court. The learned Judges (Sir N. R. Chatterji and Mr. Justice Chotzner), agreeing with the Trial Court, dismissed the appeal. The following extracts from their judgment are material for purposes of this report:—

"So far as the question of succession is concerned, the authorities show that the principle of survivorship regulates the succession in a Mitakshara joint family, though the estate is an impartible one governed by the rule of lineal primogeniture, except that the estate is held by a single member. In the present case, however, the question is not one of succession, but the power of testamentary disposition over an impartible estate. So far as the question of the power of alienation is concerned the leading case is that of *Sartaj Kuari* v. *Deoraj Kuari,* (1888) L R 15 I A 51: I L R 10 A 272 (P C). The case establishes the proposition that in an impartible estate governed by the rule of lineal primogeniture the co-parcenary which under the Mitakshara Law is created by birth does not exist."

"The next case is the First Pittapur Case, (1899) L R 26 I A 83: 9 M L J Sup 1 (P C) in which it was distinctly laid down that an impartible

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estate is not inalienable by will or otherwise by virtue only of its impartibility, and in the absence of proof of some special family custom or tenure attaching to the *zemindari* and having that effect. That is a case directly in point, and unless it can be distinguished is binding upon us."

"It is contended that impartibility is inconsistent with the power of alienation, that if the holder of an impartible estate has the power of alienation, he can, if he chooses, put an end to the impartibility by alienating the estate to different persons who may be absolute strangers to the family, and who can at once partition the estate, and that in fact impartibility, lineal primogeniture and inalienability all converge to preserve the entity of the estate."

"The reason, however, why an impartible Raj has been held to be alienable in the cases cited above is that in such an estate, the co-parcenary which under the Mitakshara Law is created by birth does not exist and the reason for restraint upon alienation, therefore, ceases to exist in the case of an impartible estate".

"It is contended on behalf of the appellant (defendant) that if, as held in a series of cases, the succession to an impartible Raj also goes by survivorship, the right by survivorship being prior to a right under a will operates only from the death of the testator, there was no property of Satrughna upon which the will could operate."

"The principle of survivorship, however, which governs succession in ordinary joint family under the Mitakshara, has to be followed, according to the decisions since Sartaj Kuari's Case in the case of impartible estate only for a particular purpose, *viz.*, to find out a successor, and it is only for the purpose of determining who is entitled to succeed, that the estate is to be treated as the property of the joint family."

"The question, therefore, is no longer *res integra*, and we are bound to hold, having regard to the decisions of the Judicial Committee in Sartaj Kuari's Case and the First Pittapur Case that in the absence of any custom an impartible estate is alienable by way of transfer *inter vivos*, as well as by a testamentary disposition".

Sir George Lowndes, K. C., *A. M. Dunne*, K. C. and *Hyam* for appellant.

De Gruyther, K. C. and *Dube* for respondent.

3rd May, 1927. The Judgment of their Lordships was delivered by

Lord Warrington.

LORD WARRINGTON :—The subject-matter of the present appeal is a family estate known as the Dhalbhum Raj, situate in the districts of Singhbhum and Midnapur, in the province of Bengal.

The family is a joint and undivided one, governed by the Mitakshara school of Hindu law. The estate is ancestral, and succession to it is governed by a family custom according to the rule of lineal primogeniture. The Raj is impartible. The last holder of the estate prior to the present dispute was Raja

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Satrughna, who, in 1887, succeeded to it on the death of Raja Ram Chandra III.

On the 11th May, 1905, Raja Satrughna made a will, whereby he appointed the respondent executor, and bequeathed the estate to him and declared him to be the next Raja. Probate of the will has been duly granted to the respondent. It is admitted that, if the will had not been made or is inoperative, the appellant, according to the rule of lineal primogeniture, is the next heir, and as such is entitled to succeed to the estate.

The main question in the appeal is whether the estate is inalienable by will.

In both Courts in India, first by the Subordinate Judge of the district of Midnapur, and on appeal by the Judges of the High Court of Judicature of Bengal, this question has been answered in the negative, and the title of the respondent has thus been upheld.

Both Courts in India have held that the question is settled by decisions of this Board. Their Lordships agree with this view, and it will be sufficient for the purposes of the present judgment shortly to state the nature and effect of the previous decisions referred to.

The question of the alienability of an impartible Raj first came before the Board in the case of *Sartaj Kuari* v. *Deoraj Kuari* (1) on appeal from Allahabad. The question in that case was as to the validity of a gift *inter vivos* of part of an impartible estate made by the owner for the time being in favour of his younger wife. The validity of the gift was disputed by his son by the first wife, who contended that the owner had no power to alienate any part of the Raj estate except for purposes of necessity. The Board, by its judgment, delivered by Sir Richard Couch, held that the gift in question was valid on the ground that the title to prevent alienation rests upon the present co-ownership of the person who wishes to retain it, and that in the case of an impartible Raj, such present co-ownership does not exist, inasmuch as it is so connected with the right to partition that, where that right does not exist, present co-ownership falls with it.

This case was decided in the year 1888.

The next case was the first *Pittapur* case [*Venkata Surya Mahipati* v. *Court of Wards* (2)], decided in the year 1899.

1 (1888) L R 15 I A 51 : I L R 10 A 272 (P C)
2. (1899) L R 26 I A 83 : 9 M L J Sup. 1 (P. C).

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The question in this case was whether the Raj was alienable by will. The judgment of the Board decided two points: (1) that the *Sartaj Kuari* case covered by analogy the case of alienation by will, and (2) that the law laid down thereby applied in Madras and was not confined to the North-West Provinces in which the case arose. The Board, therefore, not only followed their previous decision, but extended it so as to make it apply to alienation by will as well as to alienation *inter vivos*.

In the opinion of their Lordships, they ought to accept and act upon these decisions, unless it could be shown that they are inconsistent with other decisions of the Board, or that some principle of law demanding a contrary decision was clearly ignored or forgotten.

Accordingly, a strenuous attack on the two judgments was made by counsel, which really resolved itself into the contention that they were inconsistent with judgments of the Board dealing with the right of succession, in which it had been held that such right is not affected by the impartible nature of the Raj. It was argued that the co-ownership, the existence of which was denied in the two cases in question, is essential to the right of succession, and accordingly that the two lines of decision are inconsistent with each other, and that it is open to their Lordships to choose between the two.

Their Lordships are unable to adopt this view. The last of the cases on the question of succession is *Baijnath Prashad Singh* v. *Tej Bali Singh* (3). In delivering the judgment of the Board, Lord Dunedin, referring to the *Sartaj Kuari* case, said:—

"What was decided was that in an impartible Raj there was no restriction on the power of alienation of the member of the family who was on the Gaddi and was in possession in respect that there was no such right of co-ownership in the other members as to give them a title to prevent such alienation. The right of the other members that was being considered was a presently existing right The chance which each member might have of a succession emerging in his favour was, obviously, outside the sphere of inquiry."

The Board refused in terms to pronounce an opinion that the decision in the *Sartaj Kuari* case was wrong, though they pointed out that it would have been possible to decide the case differently

"if the theory had been accepted that impartibility being a creature of custom though incompatible with the right of partition, yet left the

3. (1921) L R 48 I A 195 · 40 M L J 387 (P C).

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general law of the inalienability by the head of the family for other than necessary causes without the consent of the other members as it was."

In the opinion of their Lordships the judgment last referred to is fatal to the contention that the *Sartaj Kuari* case and the *Pittapur* case are inconsistent with those on the right of succession, and they must hold that no ground has been established for a refusal on their part to follow the decisions in those two cases.

But it was recognised in both those cases that the general rule thus established might be displaced by proof of a family local custom restricting alienation, the onus of proving such custom being cast upon the person who alleges it, and accordingly an attempt was made in the present case to prove such a custom. In both Courts in India the attempt failed, and, in their Lordships' opinion, no ground has been shown for reversing their findings in this respect.

Only two items of evidence were really relied upon in argument: (1) that there had been no instance of a will purporting to dispose of the estate, and (2) a statement by Satrughna himself that a previous Raja Ram Chandra III had no right to make a will.

As to the first item, the mere absence of any will is an equivocal circumstance. It might be attributable to an assumption on the part of the several Rajas that the law did not admit of a bequest of the Raj, or to the absence of any desire on their part so to dispose of the Raj. It cannot, in their Lordships' opinion, be by itself sufficient evidence of the alleged custom.

As to the second, when it is examined, it will be found that it is a statement, not on oath, but made by way of pleading in proceedings in which Satrughna was disputing an alleged will of his predecessor and taking every possible objection to its validity, and was, therefore, a statement made in what he then considered to be his interest. Moreover, it is by no means clear that the statement was intended to be based on a family custom at all (*see* the passage in the judgment of the High Court, p. 24, l. 17, and following).

The alleged custom varying the rule laid down in the cases above referred to has, in their Lordships' opinion, not been proved, and the rule itself must therefore apply.

One other point made by the appellant remains to be noticed. In his case the point is raised in paragraph 6 of the reasons, which reads as follows:—

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"Because the nature of the estate, being originally a Raj or principality and not being affected or altered by permanent settlement, renders it inalienable."

In the judgment of the High Court it is stated that in the Court below counsel for the defendant conceded that

"he could not press the contention that the estate was inalienable on account of its being one of military or feudal nature" (Record II, page 46, l. 37),

but the Court nevertheless dealt with the point and overruled the appellant's contention. They pointed out that the grant of the estate under the first settlement of 1777 was on the usual conditions on which grants to Zemindars were made. There was nothing feudal or military in it. Their Lordships agree with the High Court that in the present case, inasmuch as for upwards of a century there has been nothing military or feudal in the tenure and the estate has been an ordinary zemindari, no inalienability can result from the ancient nature of the tenure.

On the whole, their Lordships are of opinion that the main appeal fails, and ought to be dismissed with costs, and will humbly advise His Majesty accordingly.

There remain the cross-appeals of the respondent.

These are three in number:—

First, the respondent (the plaintiff in the suit) raises objections to the provisions in the decree of the Subordinate Judge, as affirmed by the High Court, dealing with his claim for repayment by the appellant (the defendant in the suit) of monies received by him by way of maintenance while the estate was in the charge of the Court of Wards after the death of Satrughna and with the costs of the suit and of the appeal to the High Court.

Secondly, he appeals from an order of the High Court, dated the 28th July, 1924, continuing, pending this appeal, the appointment of a Receiver already appointed by the Court pending the appeal to itself.

Thirdly, he appeals from a further order of the High Court, dated the 13th August, 1924, directing the Receiver to pay to the appellant the sum of Rs. 1,200 per mensem by way of maintenance pending this appeal.

While the estate was in the charge of the Court of Wards the appellant received the sum of Rs. 27,000 by way of maintenance, being three payments of Rs. 9,000 per annum. The

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respondent claimed repayment of this sum from the appellant by way of mesne profits. This claim was allowed by the decree, but on the sole ground that the appellant had no means to pay the mesne profits and the costs, it was directed that the respondent should realise the same from the estate and the appellant should not be personally liable.

In the opinion of their Lordships, the appellant was not entitled to maintenance out of the estate—first, on the ground that the maintenance of himself and his family was already provided for by a *khorposh* grant of certain villages to his predecessors, which villages are still in his possession; and, secondly, because he has failed to establish a right to maintenance by custom or relationship or in any other way [*see* the second *Pittapur* case, *Raja Rama Rao* v. *Raja of Pittapur*(4)]. This being so, and the respondent being thus entitled to receive back what had been wrongfully paid, it is difficult to understand why this burden should be thrown on the estate, which as the result of the suit had been recovered from the appellant. The same remark applies to the costs. The respondent may not be able to recover the money owing to the poverty of the appellant, but this is no reason why an order for payment should not be made.

Their Lordships will therefore humbly advise His Majesty that the first cross-appeal should be allowed with costs and the decree of the High Court varied by directing the appellant to pay the Rs. 27,000 and the costs of the suit and of the appeal to the High Court.

As to the second and third cross-appeals, if the appellant is not entitled to maintenance, their Lordships fail to see why he should have received anything pending the litigation. They will therefore humbly advise His Majesty that these appeals also should be allowed with costs, and that the two orders of the 28th July, 1924, and the 13th August, 1924, should be set aside and the appellant be directed to repay to the respondent the sums paid by him thereunder. The setting aside of the order of the 28th July, 1924, should be without prejudice to the liability of the Receiver to account.

Solicitors for appellant : *Barrow, Rogers* and *Nevill.*

Solicitors for respondent : *Watkins* and *Hunter.*

K. J. R. *Cross-Appeals allowed.*

4. (1918) L R 45 I A 148 : 35 M L J 392 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE ODGERS.

Makam Lakshmi Narayanappa and others ... *Petitioners** (*Petitioners—Defendants* 9 *to* 11)

v.

Makam Batchayya and others ... *Respondents* (*Respondents—Plaintiff and Defendants* 2 *to* 8).

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Civil Procedure Code, S. 152 *and Schedule II, paragraph* 12—*Reference to arbitration—Award on the basis of figures in documents produced by the parties—Decree in terms of award—Subsequent finding out of mistake in the figures—Remedy.*

The parties to a suit referred their differences to arbitration and the arbitrators made an award based on the figures in certain documents produced by both the parties. The figures were not questioned by either party before the arbitrators. A decree was passed in terms of the award without any objection being taken Subsequently it was found that in these figures there was a mistake of one thousand rupees owing to a mistake in addition of the sums carried forward in one of the documents and the aggrieved party applied to the Court to correct this error.

Held, that the error was not a clerical or arithmetical mistake or one arising from any accidental slip or omission which the Court ought to correct under S. 152 of the Civil Procedure Code, nor was it a mistake apparent in the face of the record which could be set right under paragraph 12 of Schedule II of the Civil Procedure Code, and that the proper remedy of the aggrieved party was by way of review or appeal.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Madanapalle in I. A. No. 450 of 1923 in O. S. No. 381 of 1920.

B. C. Sankaranarayana for petitioners.

E. Krishnamurthi for respondents.

The Court delivered the following

JUDGMENT :—This petition raises rather an interesting point. The parties to a certain suit referred their differences to arbitration and the arbitrators made an award based on certain documents, Exs. XXVI, XXVII and XXXIII, which contain certain figures on which the arbitrators based their decision. According to the District Munsif certain portions of Exs. XXVI and XXVII were torn and Ex. XXXIII carried out or carried forward the total which it is thought would have appeared in the missing portions of Exs. XXVI

*C. R. P. No. 364 of 1924. 4th February, 1927.

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and XXVII. Both sides put in all the three exhibits and relied on them and the arbitrators made their award substantially on the basis of the figures contained in these three exhibits, which figures, as far as I can understand, were unquestioned by either side. Now, it is found that in these figures there is a mistake of exactly one thousand rupees owing to a mistake in addition of the sums carried forward into document Ex. XXXIII. The petitioner, who, I assume, is the person aggrieved by this mistake, moved the learned District Munsif and has come here in revision of his decision to get this error corrected. I should have said that the decree was passed in terms of the award without the slightest objection being taken. So that we have got this to start with, that everybody agreed that the award based on the figures presented by both sides or agreed to by both sides was a proper award. The petitioner applied to the District Munsif to correct this error under S. 152 or under the special paragraphs applicable to arbitrations (Schedule II, paragraph 12).

The question is whether this is a "clerical or arithmetical mistake in a judgment or a decree or is an error arising therein from any accidental slip or omission" which the District Munsif ought to have corrected, or is it a case where the award contains a clerical mistake or an error arising from an accidental slip or omission which is practically the same thing. The District Munsif refused to correct it on the ground "that it was not a mistake or slip or omission made by the arbitrators or by the Court" and that cannot be doubted. He also said that it cannot be predicated that, because the data on which the result is founded are found to be erroneous, it was not the intention of the arbitrators to fix Rs. 41,594-7-6 as the sum which they arrived at in their award. Now the question is, has the District Munsif gone wrong in law, and if he has, can I correct him in revision? Mr. Sankaranarayana, who appeared for the petitioner, has put before me several cases, to some of which I shall shortly refer, and the gist of the cases comes to this, that, of course, an accidental error can be corrected, and the accidental error can be corrected even although it arose in the plaint or some other pleading and was put forward under a mistake by counsel from the very beginning of the case of the party affected. He says that this is closely analogous to the present case where the representatives of the parties on each side put forward this document Ex. XXXIII. Appa-

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rently the crucial figures did not appear in documents Exs. XXVI and XXVII, and the cases, of course, further say that it does not matter whether a particular proceeding results in a decree after a trial or whether it is a decree after an arbitration. If they are clerical or arithmetical error or errors arising from slip or omission they can, of course, be corrected. I will just see how far these cases go in the direction of trying to help the petitioner. One would be perfectly willing to help him if one could, because he has undoubtedly been the victim of some mistake. The only thing is, can one help him especially in a Civil Revision Petition? The first case I will refer to is *Hyder Sahib* v. *Giria Chettiar* (1), which was referred to in the Lower Court. But there, as the District Munsif points out, I think the vital distinction is that the arbitrators themselves, unlike this case, miscalculated the amount due to one of the parties since they took 80 lbs. instead of 82 lbs. as a maund. I do not think that case really helps the petitioner. *Allah Dia* v. *Rahimuddin* (2), a case of the Allahabad High Court, lays down what I was saying just now, that, if there is a mistake in the final form of order or decree due to a original mistake by the party or his lawyer in the application or pleadings, that also can be corrected. The judgment of the learned Judges there proceeds on the assumption that the learned Judge below was satisfied that a mistake had been made. The learned District Munsif from the sentence I quoted above cannot be said to have been satisfied that a mistake has been made. The next case is *Surjan Singh* v. *Wasir Singh* (3), where there was a misdescription of a certain locality in the plaint which was in danger of being carried forward into the decree and might injuriously affect the right of the plaintiff or misrepresent the true state of facts. That, it was held, could be corrected. There, of course, it is a mistake. In all these cases of correction of mistakes which originally appeared in the plaint or in the presentation of the case at the bar, there was a mistake by one of the parties or by his agents. In *Mahaboob Begum Sahiba* v. *Lal Begum Saheba* (4), a case of this Court, the learned Judges held that even after the final decree a clerical error, namely an incorrect Survey No., can be rectified though it is made in the plaint and repeated in the subsequent records. The same remark applies to that case. It

1 (1913) 24 M L J 483. 2. (1924) 22 A L J 215.
3. (1923) 21 A L J 328. 4. (1921) 14 L W 445.

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will be observed in all these cases that there is no actual parallel with the present case because there is no arithmetical error and, in the present case, the mistake goes deeper; it is further below the surface than in any of the case cited for the petitioner. The mistake is embedded in a document which was presented to the arbitrators by both sides as containing the correct data. On the other side the following cases among others were cited to me. *Pitchayya* v. *Subba Rao* (5) is a case of this Court where Sadasiva Aiyar and Moore, JJ., held that where in a decree passed on an award a relief as to payment of costs was embodied which was not part of the award the defect can be remedied only by an appeal or an application for review. I am inclined to think that really in the present case the matter is one either for a review or for an appeal. *Gopal Dinkar* v. *Ganesh Narayan* (6), is a strong case against the petitioner, where the learned Judges say at p. 517 that when the parties agreed to have their disputes settled by their arbitrators they agreed to accept the decision of the arbitrators whether it might be right or wrong and the Court can only alter the award within the limits laid down by the 2nd Schedule. There is a decision which was also referred to *Shiam Lal* v. *Parshottam Das* (7), where it was decided that it is not a ground for remitting an award on a matter referred to arbitration or for setting aside an award that the arbitrator has made a mistake in arithmetic and apparently unintentionally has awarded a larger sum of money to be paid by one party to the other than he would have awarded if his attention had been directed to the mistake. In *Ramanathan Chettiar* v. *Muthiah Chetty* (8) the learned Judges say:

"Ex. III makes it clear that the settlement was made by arbitrators or mediators. Such a settlement is not liable to be reopened except on the ground of fraud which is not alleged in this case."

Nor of course is it here. The petitioner practically asks me to re-open the award by declaring that the figures arrived at by the arbitrators are wrong and, I suppose, correcting them to what should be the proper figure. It therefore seems to me that I have not got materials before me to say that the learned District Munsif had no jurisdiction to decide as he did or that he was wrong in law. The application is practically not to correct an error patent and apparent on the face of the record

5. (1916) 3 L W 499. 6. (1920) I L R 45 B 512.
7. (1920) I L R 42 A 277. 8. (1919) I L R 43 M 429 at 433 : 38 M L J 247

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but to go much deeper into the matter and to re-open the accounts and the figures at which the arbitrators have arrived. This of course cannot be done in a Civil Revision Petition. The Civil Revision Petition must therefore be dismissed with costs.

N. S. *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—VISCOUNT SUMNER, LORD ATKINSON AND LORD CARSON.

M. A. Sassoon and Sons, Limited ... *Appellants** (*Defts.*)

v.

The International Banking Corporation ... *Respondents* (*Plaintiffs*).

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Negotiable Instruments Act (*XXVI of* 1881), *S.* 30—*Liability of drawer of bill of exchange to reimburse holder for value on dishonour by acceptor—D|A draft—Confirmed credit—Deletion of words in printed mercantile contract.*

Drawers of bills of exchange who discount them with a Bank are bound, in case of dishonour by the acceptors, to compensate the holder for value (that is, the Bank), unless they (the drawers) can show that, when they discounted the bills, they bargained that the transaction should be without recourse. To relieve the drawers from their liability and to limit the Bank's *prima facie* right of recourse against themselves (the drawers), they must show some contract with the Bank to that effect, or some breach of contract or of duty on their (the Bank's) part, which would have that effect in law.

Where drawers, when discounting the drafts, made over documents of title (bills of lading) to the discounting Bank, and the drafts were marked D|A (which meant "Documents against acceptance"), *Held,* that the drawers' description of the drafts as D|A was, in effect, a direction by them to the Bank to surrender the documents to the acceptors against their acceptance. Consequently, on the Bank presenting the drafts for acceptance to the drawees, and acceptance being duly given, the Bank were justified in handing over the shipping documents to the acceptors. On the drafts being subsequently dishonoured at maturity by the acceptors the drawers became liable to reimburse the discounting Bank. There was, under the circumstances, no misdealing by the Bank with the drawers' rights by way of security as would afford any answer to their (the Bank's) action.

The incidents of a "confirmed bank credit" discussed.

Where words in a printed form of a mercantile contract are deleted, the effect is the same as if the deleted words had never formed part of the print at all.

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*P C Appeal No. 99 of 1926. 27th May, 1927.

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Appeal (No. 99 of 1926) from the High Court of Calcutta.

The facts of the case sufficiently appear from the judgment of the Judicial Committee.

F. B. Merriman, K. C. and *J. Nissim* for appellants.

Sir Herbert Cunliffe, K. C. and *M. R. Jardine* for respondents.

27th May, 1927. The Judgment of their Lordships was delivered by

Viscount Sumner.

VISCOUNT SUMNER.—The appellants in this case were sued in the High Court at Calcutta, as drawers of four bills of exchange, by the respondents, who discounted them, the bills having been dishonoured at maturity by the acceptors, Messrs. George Knowles and Company, Limited, of London. The decision went against them both at the trial and on appeal, but the High Court granted their certificate for leave to appeal to His Majesty in Council.

The appellants are export merchants in Calcutta, and on the 9th August, 1923, they offered two drafts for discount to the respondents, who are bankers there. Two others for the same amounts were sent on the 6th September. The second transaction was a mere transaction of course, following on the first.

The documents were put before Mr. Thompson, the respondent's manager, and on his approval of them the drafts were discounted. In addition to the two drafts, there were a bill of lading for 25 bales of gunnies to be delivered at Dundee and an invoice and mills' specification relating to them. By arrangement, an insurance policy was to be and was produced in England and it need not be further referred to. There was, further, a letter of advice, dated the 18th June, 1923, from the Eastern Bank, Calcutta, to Messrs. Sassoon and Company, and a memorandum from Messrs. Sassoon and Company, containing their request for discount, the amount to be passed to their credit.

This memorandum showed a conversion of the amounts of the two drafts, viz., £696-10-0 into rupees at 1*s*. 4 3|16 *d*., as per Messrs. T. S. Apcar and Company's contract, dated the 11th May, 1923, being the amount for which credit was asked. The drafts were thus described: "For our 3 M|St. D|A drafts 2048 and 2048A on Messrs. George Knowles and Company, Limited, London," and they bore the words "value received for 25 bales gunnies shipped per S. S. 'Malancha' to Dundee drawn under

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L|Agreement No. 237, dated the 30th May, 1923, signed with the Eastern Bank, Limited, London, as per advice dated the 18th June, 1923;" but, except as showing the existence of some relevant agreement, with particulars to identify it and connect it with this particular transaction, these words do not carry the present case any further. The bill of lading for twenty-five bales of gunnies shipped by J. S. Ezra made the goods deliverable to order, and was dated the 2nd August, and the invoice, dated the 8th August, was an invoice of goods by Messrs. Sassoon and Company for account of Messrs. George Knowles and Company, Limited, for the net amount of £696-10-0.

Although in the evidence nothing was specially disclosed as to the relations of Messrs. Sassoon and Company and Messrs. Knowles and Company, the transaction, so far, was of the most ordinary type. The contract with Messrs. Apcar had been made by that firm as exchange brokers between Messrs. Sassoon and Company and the International Banking Corporation. Messrs. Sassoon and Company, having sold the gunnies forward to Messrs. George Knowles and Company, wished to protect themselves against fluctuations in sterling exchange before the shipping date arrived. Accordingly, they at once made a contract, by which they became entitled to discount for their approved drafts later on at the rate current on the day of the contract itself. They were, in a word, content with their profit on the sale, and had no mind to speculate in exchange as well.

On examining the documents put before him, Mr Thompson apprehended the nature of the transaction above stated quite as fully as was necessary, though Messrs. Knowles and Company and the terms of their purchase contract were unknown to him. Messrs. Apcar's exchange contract was for "approved bills of exchange, drawn at 3 M|St. D|A on London at the exchange of 1*s*. 4 3|16*d*. per rupee," with certain options for shorter or longer terms at rates fractionally higher or lower as specified, and the letter of advice from the Eastern Bank, Calcutta, sufficed, even if Messrs. Sassoon and Company's name had not done so, to secure his approval of the drafts on behalf of the respondent bank. Accordingly, Mr. Thompson passed on the shipping documents to be examined by his shipping department and, being found in order, they were sent with the discounted drafts to London to be dealt with there. The form in which the International Banking Corporation instructed their London correspondents was, of course, a domestic matter and gave the

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appellants no further rights. The obligations arising out of the discounting of the drafts under the circumstances of this case were obligations which, as between these parties, arose in Calcutta. As the letter of advice required, the amount and date of this discount transaction were endorsed on it, and stamped with the respondent bank's name. Messrs. Sassoon and Company got credit for their Rs. 10,326-7-9. On the other hand, the respondents' correspondents in London, duly following out their instructions, presented the drafts for acceptance to Messrs. Knowles and Company on the 28th August, and acceptance being duly given, handed over the documents to them. Unfortunately, the acceptances were all dishonoured at maturity, in the case of the first two at the beginning of December. The events relating to the other two drafts sued on were in all respects similar, and do not require to be further mentioned.

On the face of the bill transaction, the respondents were entitled to recourse against Messrs. Sassoon and Company. By their pleadings, the latter contended that pursuant to Messrs. Apcar's exchange contract, the International Banking Corporation purchased the drafts and no longer had the right of recourse against the drawers, that would, *prima facie,* have belonged to the holder for value; that in view of the existence of a confirmed credit, of which the International Banking Corporation had notice, they ought to have delivered the bills of lading to the Eastern Bank, Limited, in London, and not to Messrs. George Knowles and Company; that the appellants being precluded by this misdelivery from recovering the price of the gunnies from the Eastern Bank, were accordingly discharged from their liability on the bills to the respondents, and, in the alternative, that, if the respondents' liability for this misdelivery sounded in damages only, the amount of such damage was the same as the amounts of the bills, and could be set off so as to extinguish any liability on the bills. No custom of merchants or bankers as to confirmed credits in connection with documentary bills or otherwise was pleaded, proved, or relied on. At their Lordships' bar the appellants' counsel did not insist on the contention that the mere negotiation of the drafts pursuant to the exchange brokers' contract was in itself an out-and-out purchase of them by the Banking Corporation without recourse to the drawers in any event, and the question whether the remedy was

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by way of set off or only of counter-claim for damages was not debated before them.

The conclusion of the Trial Judge that the transaction disclosed nothing to relieve the drawers from their liability was affirmed by the High Court, the learned Judges holding that the question really turned on the documents, and that whatever assumptions might be made in favour of Messrs. Sassoon and Company as regards their transaction with Messrs. Knowles and Company, the description which they gave of the drafts, unaccompanied by any explanation limiting the effect of D|A as a description, entitled the International Banking Corporation to surrender the bills of lading to the acceptors on getting their acceptance, as they did.

The facts are as follows Messrs. Knowles and Company became known to Messrs. Sassoon and Company as early as September, 1922, and, after some correspondence, a contract was concluded between them on the 11th May, 1923, for twenty-five bales of gunnies per month, to be shipped from July to September. So far as the evidence shows, Messrs. Knowles and Company were then in reasonably good credit, nor does it appear that their insolvency was suspected until the time when they dishonoured their first acceptances They were throughout personally unknown to the International Banking Corporation.

The terms on which Messrs. Knowles and Company from the first proposed to deal and ultimately did deal with Messrs. Sassoon and Company included the following:—the price was c. i. f. U. K., and reimbursement was to be by drafts at ninety days' sight against confirmed credit, to be opened in the sellers' favour upon the conclusion of each contract. After the first purchase and sale had been concluded, the Eastern Bank in London wrote to its branch in Calcutta on the 31st May, 1923, enclosing copies of letters of agreement with that bank signed by Messrs. George Knowles and Company on the previous day and described as being "in favour of Messrs. Sassoon and Company available to be presented at three months' sight against full shipping documents." While this letter was in the post Messrs. Sassoon and Company cabled to Messrs. Knowles and Company on the 5th June, "Referring to your letters of credit, they must be confirmed irrevocably." Thereupon, on the 19th June, the Eastern Bank in London cabled to its Calcutta branch that the letters of agreement signed by Messrs. Knowles and Company, of which copies had been forwarded, were "now confirmed cre-

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dit." The communication itself, which had obviously been made by Messrs. Knowles and Company to the Eastern Bank in London between the 5th and 19th June, is not in evidence, but Messrs. Knowles and Company's letter of agreement addressed to the Eastern Bank in London and dated the 30th May, is endorsed by some one in pencil, "Made confirmed credit, 15th June, 1923." It is sufficient to quote from it the following:—

"We hereby authorise and request you and your agents in Calcutta to give banking facilities and accommodation.... against and|or negotiate on or before 15th October, 1923, any....bills..... not exceeding three months after sight and drawn on us by or endorsed by Messrs. A. Sassoon and Sons, Limited, and .... we hereby agree duly to accept any such bill or bills for any *sum* or sums not exceeding in the aggregate £2,080 and to pay the amounts of such bill or bills at maturity.

"The drawers and|or endorsers and|or the holders of such bill or bills will hand over, but merely by way of collateral security, to you bills of lading for merchandise.... and we agree that, in case you consider it necessary, you shall be at liberty to sell.... any of the said merchandise ... .and apply the net proceeds..... towards payment of the said bill or bills......

"It is further agreed that the granting of the said facilities and accommodation and|or the negotiation of any bill or bills above referred to shall be optional, and that this agreement cannot be either revoked or altered in any way except in writing with the express consent of your bank......."

Of this document, which appears to have been headed "Agreement from London No. 2 (with recourse)," no copy was sent to Messrs. Sassoon and Company, though a copy was sent to the Eastern Bank's Calcutta Branch. On the 18th June, however, the Calcutta Branch sent to Messrs. Sassoon and Company a letter of advice, of which the following parts are specially material:—

"We beg to inform you that an advice has reached us from our London office of letter of agreement, No. 237, signed by G. Knowles and Company, Limited, authorising us to negotiate a bill or bills drawn by you on George Knowles and Company.......

"We are informed that the bills of lading for merchandise, together with the relative invoices and policies.... will be handed to us. Such bills of lading should be presented to us in complete sets, made out 'to order,' blank endorsed and marked by the shipping company 'freight paid'...........

"We have pleasure in informing you, that we are prepared at our option as usual to make advances against and|or negotiate any bill or bills drawn in compliance with the terms of this letter."

This letter of advice was on a printed form, and after the above words "of this letter," the form proceeded as follows:—

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"it being understood that this is not a confirmed bank credit, and you are in no way released from the ordinary liability of drawers."

These last words from "it being" to "of drawers," were deleted, and after the signature of the Eastern Bank of Calcutta there followed two additions, viz.:—

"Please note that this authority is a confirmed credit.

"When offering drafts for negotiation under this authority, it is imperative that this letter be produced to enable the negotiating bank to note payments on the back hereof."

On these documents the following observations arise. (1) It was apparently part of the appellants' argument that the deletion of the words in the form "you are in no way released from the ordinary liability of drawers" in combination with the added words, "this authority is a confirmed credit," imports that "you are in some way released from that liability." Their Lordships cannot accept this. There is a good deal of authority, now old, about the effect of deleting words in a printed form of mercantile contract, which it is not now necessary to cite, but they take it to be settled, in such a case as this, that the effect is the same as if the deleted words had never formed part of the print at all. The words expressly added, of course, remain to be construed.

(2) The letter of agreement, signed by Messrs. Knowles and Company, contains only the authority given and the promise made by that firm to the Eastern Bank, Limited. So far as the record goes it is not shown how Messrs. Knowles and Company and the bank arranged that the bills of lading should reach the latter in case the drafts were discounted elsewhere, nor is any actual agreement disclosed by which Messrs. Knowles and Company undertook to accept drafts presented by other parties, though no bills of lading were tendered. The general effect of the bank's undertaking and liability may be easily surmised, but their precise terms must have been a matter of express arrangement between these two parties, and the actual undertaking of the Eastern Bank in London, which almost certainly was in writing, was not disclosed.

(3) What the Calcutta Branch of the Eastern Bank conveyed to Messrs. Sassoon and Company in their letter of advice, which was all the information that the latter had about the terms of the agreement between Messrs. Knowles and Company and the Eastern Bank in London, was confined, except for the second addition above set out, to transactions, in which Messrs. Sassoon and Company would send drafts, with documents attached, to the Eastern Bank in Calcutta for discount, and

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would then hand over to the bank drafts and shipping documents against payment or credit of the relative sum in rupees. Thenceforward the discounting bank would hold both drafts and bills of lading and, in accordance with Messrs. Knowles and Company's letter of agreement, could look after itself.

(4) It is contended that in spite of the words "when offering drafts for negotiation under this authority," which authorise negotiations to the Eastern Bank alone, the succeeding words "to enable the negotiating bank," convey that the authority advised in the letter of advice extends to transactions with other negotiating banks, and should not be construed as merely meaning "to enable us when we negotiate the drafts..." Even if this be so (and it is a very summary way of converting the terms of a discount offer by one bank into an undertaking applicable to actual discounts by any other bank), it does not follow that, if a third party bank negotiates, all the undertakings and all the dealings referred to in this letter of advice will be or can be made applicable forthwith to such a substituted transaction.

If the drafts had been offered for discount to the Eastern Bank in Calcutta, or if, by arrangement between Messrs. Knowles and Company and the Eastern Bank, the drafts of Messrs. Sassoon and Company had been drawn on the latter [*Chartered Bank of India* v. *Macfadyen* (1); *Scott* v. *Barclays* (2)], the transaction would have been one of a normal type, which has often been explained and illustrated in the decided cases, and it would have completely met all the mercantile necessities which such a transaction has been devised to meet [*Guaranty Trust* v. *Hannay* (3)], except the possibility that the rate of exchange might have moved against Messrs. Sassoon and Company between the 11th May and the 9th August. The negotiation of the drafts with the International Banking Corporation under the circumstances above detailed is, as far as reported cases go, a novelty. It is here that the difficulty of this case begins. In the case of *Chandanmull Benganey* v. *National Bank of India, Limited* (4), some of the drafts mentioned were dealt with in the same way and under similar circumstances, but nothing in the decision throws any light on the legal consequences, which this peculiarity may involve.

According to the evidence on both sides, however, there was nothing extraordinary, still less irregular, in offering drafts,

1. (1895) 64 L J Q B 367.
2. (1923) 2 K B 1.
3. (1918) 2 K B 623 at 660.
4. (1923) I L R 51 C 43.

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fortified with the letter of advice of the Eastern Bank's confirmed credit, to be discounted by another bank such as the International Banking Corporation. Mr. Young, an official of the Eastern Bank in London, said that the postscript to the letter of advice meant that the negotiating bank might be the Eastern Bank or any other bank, and in this he was not apparently speaking merely of his own view of the wording of the postscript but of banking practice generally, for the plaintiffs' manager, Mr. Thompson, said frankly that, although the letter of advice "asked for the documents to go to the Eastern Bank, Limited, Calcutta," it was "quite customary for other banks to negotiate drafts under credits belonging to other banks," and, in fact, "likelier than otherwise." He said, further, that there was no particular difficulty about his sending the drafts and documents to the Eastern Bank for presentation to Messrs. George Knowles and Company, and that with different shippers he would have done so, but in this case he thought that the credit arrangement had been superseded by Messrs. Sassoon and Company, that for some reason they were deviating from the credit by sending in the bills for discount D|A, that they wanted to allow (*sic*) these as documents against acceptance, and that he was willing on the strength of their names to discount the drafts on those terms, viz., D|A. Under the terms of the letter of advice, he would have handed the documents to the Eastern Bank and not to Messrs. Knowles and Company, but he thought this credit arrangement had been superseded.

Of this evidence the appellants' counsel have made much, as they were fully entitled to do, and their Lordships think it right to consider the main question in the case on the footing of these answers, as both the Courts in Calcutta appear to have done. They accordingly put aside certain contentions advanced by the respondents as follows. Neither the letter of agreement nor the letter of advice nor any document, which relates to them, makes them in terms "irrevocable," the term "confirmed" alone being used, yet both words were stipulated for by Messrs. Sassoon and Company on the 5th June, 1923. According to Mr. Thompson, the appearance of both words on the credit document is an indispensable formality. It is not easy to see in what respect either word or both of them together would carry the matter further than the word "contract," used in its strict sense, would have done, for apparently a confirmed credit is something, formerly provisional, and now turned into

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something definite by way of promise, and the word "irrevocable" simply closes the door on any option or *locus paenitentioe*, and makes the agreement definite and binding—in other words, creates a true contract, which will either be performed or be broken. The trial, however, proceeded on the footing that the credit given in favour of Messrs. Sassoon and Company and referred to in the letter of advice, was in all essentials what Messrs. Sassoon and Company had bargained for, and at their Lordships' bar it was too late to argue the contrary. So, too, without actually holding that the words added to the letter of advice, which refer to "the negotiating bank," mean that the credit and the advice are in law available to the full to any bank other than the Eastern Bank of Calcutta, which may discount the drafts mentioned therein, their Lordships will discuss the present case on the footing of the view taken by Mr. Thompson himself, that such was their meaning to the minds of business men.

As the present case is one of first impression, two general observations may be useful. So long as trade is proceeding in its ordinary course without violent fluctuations in prices, and so long as all parties concerned are in good credit, banks, whose business it is to facilitate trade, can and no doubt do by voluntary arrangements among themselves smooth out small difficulties and ignore informalities, when no serious consequences are likely to result. When, however, a court of law is for the first time called upon to fix legal liability, by declaring what the intentions of the parties must be taken to have been, it becomes necessary to consider how an unruffled and unquestioned business would work out, if difficulties were to arise such as would at each step bring out the risks to be run and the responsibilities to be borne by one or other of the respective parties. Suppose a fall in the price of gunnies, which made it important for the buyers to avail themselves of any legal ground open to them for refusing to take up the goods or to meet the bills; suppose a financial crisis, which for the time being seriously involved the reputation of the bank which had granted the confirmed credit; in either case suppose a discounting house, ignorant, as here, alike of the exact terms of the purchase contract and of the agreement for the confirmed credit; how is the discounting house to know whether it can safely give up the bills of lading to the London bank on the one hand or whether, on the other, it can reckon on acceptance of the drafts only when it has the bills of lading available to be handed to the drawee against

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acceptance? It is to be remembered that, common as it is for the grant of the credit to be made on the terms that the grantors are to be secured by possession of the bills of lading, other forms of security are sometimes used, the choice of the form depending on the relations between the two parties concerned and the solvency of the importing firm (see, for example, the terms of the credit in *The Kronprinsessan Margareta* (5) and in *Prehn* v. *Royal Bank of Liverpool* (6)]. The legal rule must be one which will fit and make sense of the transaction equally under fair-weather conditions and under foul.

Take again the practical side of the matter. There are many business situations where an offer is made, in which it is hardly possible to ask questions or to go behind the documentary materials put forward by the proposer. Underwriting a slip is one; discounting a trade draft is another. Mr. Thompson, from the documents before him, had to judge whether he would approve or disapprove, whether he would risk taking the documents or risk letting the business go past him. To ask questions, even if there had been any one at hand to answer, might have betrayed either ignorance of his own business or a desire to know too much about his customers'. The exchange memorandum told him quite plainly that the drafts were D|A, which meant "documents against acceptance." Here was an instruction as to the use he was to make of Messrs. Sassoon and Company's documents of title. True, it did not say who was to present the documents to the acceptor, but it was evident that, if the letter of advice was right in saying that the Eastern Bank was to have and keep the bills of lading, the documents could not be handed by the respondents to Messrs. Knowles and Company against acceptance at all. As discounters, their first duty, both to Messrs. Sassoon and Company and to themselves, was so to present the drafts for acceptance, as either to get them accepted or to get them dishonoured for lack of acceptance. In their Lordships' view, the respondent bank was entitled and bound to follow this instruction. In face of it, there could be no question of such a misdealing with the drawers' rights by way of security as would afford any answer to their action.

Two answers have been attempted in argument. The first is that the drafts were tendered as D|A drafts only to comply with the terms of Messrs. Apcar's exchange contract,

5. (1921) A C 486. 6. (1870) L R 5 Ex. 92.

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which fixed a standard rate for D|A drafts and options for drafts on other terms, varying from the standard by fixed fractions. It is said that all Messrs. Sassoon and Company wanted was to get the rupee exchanged at 1*s*. 4 3|16*d*. There is, however, some confusion in this. Messrs. Sassoon and Company wished to get this rate of exchange, and had to claim it under their contract by presenting drafts of such a description as that rate attached to, but the drafts were still described as D|A drafts, and, whatever the object which was immediately in view, D|A drafts they actually were. That these letters meant "documents against acceptance" was common ground, and accordingly some clear reason has to be shown for saying that, in the circumstances of this case, they nevertheless meant documents against the Eastern Bank's acceptance, which, in fact, they had not undertaken to give, or documents to the Eastern Bank against Messrs. Knowles and Company's acceptance of the draft, if they should be willing to give it without receiving the documents. Mr. Moise Sassoon actually answered the question, "Can you explain why D|A was put in the memo.?" by saying, "Because the documents were deliverable to, and for acceptance of, the Eastern Bank." This was an impossible construction. Equally so is the contention that D|A is a direction merely as to the time when the shipping documents are to be surrendered and not as to the person who is to receive them. Evidence as to the meaning of D|A as a term of art might possibly have gone as far as this, but, as the case stands, D|A on this view would be an incomplete and ambiguous direction and the party directed cannot be blamed if it was reasonably interpreted and acted on [*Ireland* v. *Livingston* (7)]. In any case, it assumes that the discounting bank is to interfere radically with what is *prima facie* the right of the accepting consignee on what may be a mere surmise. The drafts were for acceptance of Messrs. Knowles and Company, and if the documents, that is, the shipping documents, were deliverable to the Eastern Bank, then, as far as the International Banking Corporation was concerned, these acceptors would not get any documents in exchange for their acceptance. It hardly appears that on either side there had been much consideration of the rights and obligations arising out of this use of the letter of advice as applicable to a negotiation with the International Banking Corporation.

7. (1872) L R 5 H L 395.

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Accordingly, a second and much more ingenious answer was given to their Lordships. On the faith of the confirmed credit, for which they had stipulated, Messrs. Sassoon and Company proceeded to put the shipment in train to come into the hands of those who might be interested in it in London. This was done by placing the documents in the hands of the International Banking Corporation in Calcutta, with notice that the transaction was backed by a confirmed credit. After this the credit could not be revoked by the Eastern Bank. Merely to hand to a banker a draft styled D|A and a corresponding letter of credit must be deemed in law to tell him that the bills of lading are to be handed to the issuer of the letter of credit and not to the acceptor of the draft, and his remedy is to decline to discount, however approved the bill may be as a bill, if he does not like these terms. It is true that Messrs. Sassoon and Company did not bring the terms of the credit to the Corporation's notice, nor did they know them themselves, but this does not matter. They put the Corporation in the position of being able to sue the Eastern Bank in London on the credit in accordance with the principle of *In re Agra and Masterman's Bank* (8) and on inquiry it would be ascertained, as business experience would have led the Corporation to anticipate, that the condition precedent to the Eastern Bank's obligation to give effect to the credit was the delivery of the bills of lading to them. All was really plain sailing. If only the bills of lading were given up to the Eastern Bank, somehow or other the drafts would be met either by Messrs. Knowles and Company, if they accepted and paid without getting the consignment or the documents which represented it, or by the Eastern Bank, if they did not. The delivery of the bills of lading to the Eastern Bank in London, it was said, became matter of contract between the appellants and the respondents, as the result of the discounting transaction, so that the latter's recourse against the former was suspended and became ineffectual unless and until the Eastern Bank made default. In effect, the respondent bank was provisionally substituted for Messrs. Sassoon & Company as sureties for the acceptors on the bills, though this substituted suretyship would itself be defeasible in case of any wrongful failure to pay on the part of the Eastern Bank.

This argument was properly and indeed indispensably reinforced by the principles, which apply when a surety has

8. (1867) L R 2 Ch. 391.

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secured his secondary liability by placing in the principal creditors' hands security which belongs to himself in the first instance. Here Messrs. Sassoon and Company, having shipped the gunnies under such a form of bill of lading as reserved the *jus disponendi* to themselves until the documents were delivered with their authority to the buyers for the purpose of passing the property, placed these instruments, representing the goods while afloat, in the Banking Corporation's hands, as collateral security giving them a special property in the goods, but remaining available generally for the protection of the sureties to whom they belonged. They also placed within the reach and control of the principal creditors another and still more important security, the commercial pivot of the whole transaction, namely, the confirmed credit of the Eastern Bank, and to this precisely the same rules applied as to the bills of lading. If the Banking Corporation entered into the transaction with notice of the existence of a confirmed credit of an ordinary banking character without knowing its exact terms, that was their own affair. They took the risk of its being such that they could comply with them. If for any reason they failed so to deal with the bills of lading as to secure to the drawers recourse to the confirmed credit, then, *pro tanto*, the drawers would be discharged. Between *Agra and Masterman's Bank* on the one hand and *Polak* v. *Everett* (9) on the other, the discounting bank would be quite able to look after themselves.

Their Lordships are unable to give effect to these contentions. The principle of the decision cited is one applicable between the discounting bank and the bank which, having established the credit in favour of the acceptor, gives notice *urbi et orbi* of its willingness to abide by the operation of the credit through the machinery of drafts discounted before acceptance. If the respondents discounted the drafts on the faith of the invitation (if any) contained in the letter of advice, *In re Agra and Masterman's* case entitled them, if they chose to do so, to sue on the credit agreed by the Eastern Bank with Messrs. Knowles and Company as if they had been parties to it from the beginning. If they had not discounted on the faith of that invitation, the principle would not apply, and Mr. Thompson said clearly in effect, what Messrs. Sassoon and Company can neither complain of nor deny, that for him the name of Sassoon and Company was good enough in this case, and the confirmed credit was accordingly superfluous. Apart

9. (1876) 1 Q B D 669.

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from this, however, the principle would only confer a right of action on the International Banking Corporation against the Eastern Bank, if they chose to exercise it, but it would not impose on them a duty towards Messrs. Sassoon and Company, so as to modify the ordinary right of recourse at all events or in any event. It is a matter between the respondent corporation and the Eastern Bank, not between Messrs. Sassoon and Company and the respondent corporation.

On the other hand, they think that the letters D|A are a complete answer to the part of the argument, which rests on the obligation of the principal creditor not to waste the surety's security. If the creditor complies with the surety's instructions, there can be no further responsibility. The whole gist of the complaint, as far as the confirmed credit is concerned, is that by not handing the bills of lading to the Eastern Bank the respondents failed to satisfy the conditions precedent to their liability and so nullified the confirmed credit. The appellants' description of the drafts as D|A drafts destroys the validity of this complaint. Messrs. Sassoon and Company instructed the respondents to surrender the documents to the acceptors against their acceptance, and this was done. Again, if the obligation of the principal creditor not to deal unreasonably or imprudently with the securities is relied on, the result is the same. All the information given to the respondents by the drawers of the drafts, who, after all, had made their own bargain with the acceptors, pointed to the quite normal intention of giving the buyer of the gunnies control of the goods on the faith of his acceptance to the drafts. This was *prima facie* the intention, in fact, so far as the information given indicated. If the confirmed credit modified this, it was not for the discounting bank to make guesses or to run risks, but for the drawers to say what their wishes were. Their Lordships cannot say that the conduct of the International Banking Corporation was unreasonable under the circumstances.

No doubt, as soon as Messrs. Sassoon and Company had got a rupee credit for their sterling drafts at 1*s*. 4 3|16*d*., they thought as a matter of business that they had done with the transaction, and it may be disappointing to merchant shippers to find that it nevertheless remained at their risk. It may be also true that, when the Calcutta Banks fell into a course of business, which may be called a good-natured convenience to merchants or a far-sighted development of legitimate business exactly as you please, it would have been better to have intimat-

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ed to the trade, that the banks were not undertaking all the burdens of shipper's transactions, however they might turn out, but this is not the present issue. How proof of a custom of bankers and merchants, applicable to these particular facts, would have affected the decision is a matter on which it is not permissible to speculate. It may also be that the case was not as completely presented at the trial as merchants generally might have desired, but with this their Lordships cannot deal. The appellants are not in a position to show that, when they discounted these drafts, they bargained that the transaction should be without recourse, and in order to qualify their direction, given by the letters D|A, and to limit the respondents' *prima facie* right of recourse against themselves, they must show some contract with them to that effect, or some breach of contract or of duty on their part, which would have that effect in law. No authority has been produced which enables them to do so, and their Lordships cannot say that any legal principle leads to that conclusion. They will accordingly humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants : *T. L. Wilson and Co.*

Solicitors for respondents : *Sanderson, Lee and Co.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Madras]

PRESENT :—VISCOUNT DUNEDIN, LORD SALVESEN AND SIR JOHN WALLIS.

Krishnamurthi Aiyar ... ... *Appellant**

v.

Krishnamurthi Aiyar and another ... ... *Respondents.*

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Hindu Law—Adoption—Rights of adopted son—Will—Diversion of property from adopted son—Anti-adoption agreement by natural father—Custom—Consensus of judicial decision.

Having regard to a consensus of judicial decision, excepting *Jagannadha* v. *Papamma,* (1892) I L R 16 M 400, an arrangement made on the adoption of a Hindu whereby the widow of the adoptive father is to enjoy his property during her lifetime, or for a less period, that arrangement being consented to by the natural father before the adoption, is to be regarded as valid by custom. But an agreement or consent by the natural father is not effectual in law or by custom to validate any other disposition, taking effect after the adoption and purporting to limit the rights of the adopted son as a co-sharer

*P. C. Appeal No. 65 of 1925. 28th March, 1927.

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Consequently a will by which a testator gave part of his property to his intended adopted son, part to his widow for life, part to kindred, and part to charity is not binding upon the adopted son, although before the adoption took place the natural father executed a deed by which he consented to the provisions of the will and gave his son in adoption subject thereto.

Review of the authorities in Madras and Bombay.

Balkrishna Motiram v. *Uttar Narayan Dev*, (1918) I L R 43 Bom 542 approved.

Observation in *Bhaiya Rabidat Singh* v. *Indar Kunwar*, (1888) L R 16 I A 53 at 59 : I L R 16 C 556 at 564 (P C) followed.

Appeal from a decree of the Madras High Court affirming a decree of the Subordinate Judge of Mayavaram.

The facts and considerations applicable, as also the case-law, appear in the judgment of their Lordships.

De Gruyther, K. C. and *Narasimham* for appellant referred to *Bepin Behari Bundopadya* v. *Brojo Nath* (1), *Panchanon* v. *Binoy Krishna* (2), *Kalidas* v. *Bijoy Shankar* (3), *Purshottam* v. *Rukhmabai* (4). (not mentioned in the cases set out in the judgment), as also para. 196, Mayne's Hindu Law and West & Buhler, 3rd ed., p. 1101.

Kenworthy Brown for respondent.

De Gruyther, K. C. replied.

28th March, 1927. The Judgment of their Lordships was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN :—Ramakrishna Aiyar was a Hindu gentleman in possession of ancestral lands extending to some 135 acres. He was not living joint with any relative, and he was childless. On the 23rd March, 1910, he made a will by which he disposed of his property roughly as follows :—12 acres in charity; 44 acres to his wife for her life; 45 acres to the son of a distant connection, whom he designated as being his adopted son, the appellant in the present suit, and the rest to persons who were connections, but were in no case within the degrees entitled to maintenance, and who are the respondents in the present suit. After the death of the widow, part of the land which she held for life was to go to the appellant, and part to the respondents. On the same day, the natural father of the appellant executed a deed in the following terms:

"The deed of consent for adoption executed on the 23rd March, 1910, in favour of Ramakrishna Aiyar, son of Venkatachala Aiyar, Brahman, Saivite and Mirasidar, residing in Kunnam, Shiyali taluk by

1. (1882) 8 Cal. L J 362. 2. (1916) 27 Cal. L J 274.
3. (1891) I L R 13 All. 391. 4. (1913) 16 Bom. L R 57.

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Natesa Aiyar, son of A. Ramaswami Aiyar, Brahman, Saivite and Mirasidar, residing in Kunnam village of the said taluk:—

"You have this day executed a Will and have alienated your own properties. When you asked me to give you my son Krishnamurthi in adoption subject to the condition that he should take only such properties as were given him by the said Will and be bound by the alienations made thereunder, I consented to it and admitted the alienations made in the said Will, and, in pursuance of the arrangement that Krishnamurthi should take only such of the properties as were left to him thereunder, I have executed this deed of consent for adoption in support of my having this day given the said Krishnamurthi my son in adoption."

Immediately thereafter the adoption took place with all due ceremony.

Ramakrishna Aiyar died in April, 1911, and his wife in June, 1911. The present suit was raised in 1918 by the respondents to obtain possession of the properties left them by the will. It was directed against certain parties who were in possession and were alleged to be holding benami for the appellant and also against the appellant.

The persons who were holding as alleged eventually renounced all claim to the property. The appellant, through his guardian, alleged that the adoption had taken place before the date of the will, but it was found, in fact, and is not now contested, that the will was executed *unico contextu* with the deed of consent by the natural father, and that both were executed in view of the adoption which took place subsequently with all due ceremony. It is also admitted that the natural father was a poor man and had two other sons at that time, and has had two subsequently. The sole question in the case is, therefore, whether the will, taken along with the deed of consent, is binding on the appellant so as to cut down what would have been his rights had he been a natural instead of an adopted son.

The learned Subordinate Judge held that the deed was binding in respect of the consent of the natural father; he considered that an adoption, even on such terms, was obviously a beneficial arrangement for the appellant, and that the validity, as he phrases it, of such conditional adoption was settled for Madras by *Lakshmi* v. *Subramanya* (1), *Ganapati Ayyan* v. *Savithri Ammal* (2) and *Visalakshi Ammal* v. *Sivaramien* (3). He accordingly decreed in favour of the respondents. His view was confirmed by the learned Judges of the

1. (1889) I L R 12 Mad. 490. 2. (1897) I L R 21 Mad. 10.
3. (1904) I L R 27 M 577 (F B).

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High Court. They also considered that so soon as it was shown that the arrangement as a whole was beneficial to the adopted son, and that but for the arrangement the adoption would not have taken place, the natural father could give a consent which validated the arrangement as against the adopted son if, when he came to be of age, he sought not to acquiesce therein.

This is most clearly explained by one of the learned Judges:—

"I am of opinion that where an adoption is made by a Hindu who at the time of adoption had absolute power of disposal over the property, an agreement between the natural father and the adoptive father as regards alienations which the adoptive father wants to make either by a document *inter vivos* or by will binds the adopted son in all cases where such an agreement would be for his benefit, and that the only question which Courts ought to consider is whether the transaction is for the benefit of the boy to be adopted.

"If the adopting father would not make the adoption but for the conditions agreed to by the natural father, and if in spite of those conditions the adopted son would be benefited, there is no reason why the transaction should not be tested like any other agreement entered into by the natural father as guardian of his own son. In the present case the agreement is clearly for the benefit of the appellant, as he gets properties of large value which he would not have got but for the adoption, and there can be little doubt that he would have remained a poor man if the natural father had not agreed to the adopting father making the will and the adoption being conditional on the said disposition."

This view is really based on the case of *Visalakshi Ammal* v. *Sivaramien* (3) which will be presently examined. The appellant has appealed to the King in Council.

The question is a very important one of general interest. There is a very large body of authority in decided cases which touches it, but it is not concluded by any judgment of this Board. The argument for the appellant is simple enough. An adopted son, from the moment of adoption, occupies the place of a natural son. A natural son, in the case of ancestral property, becomes a co-sharer with his father, with the rights of survivorship and of partition as to the whole ancestral property. This is an incident of Hindu law arising from status. No consent by his natural father could affect that position. His power is limited to the giving or withholding of giving his son in adoption, but if he gives, his power ends.

The present will purports to infringe his rights in three particulars:—(1) The gift to charity; (2) the gift to persons outside the family; and (3) the postponement of the

3. (1904) I L R 27 M 577 (F B).

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son's own right in certain lands till his father's death, and in others till his mother's death.

The argument for the respondents is that, in any view, the law has by custom been relaxed, and that the general proposition which is stated in the view of the High Court is based on authoritative decision and is now the law.

As in several of the decisions to be examined there has been the suggestion that the matter has been decided by this Board, it may be well at once to mention cases where the question has been approached.

The case of *Ramasawmi Aiyan* v. *Venkataramaiyan* (4) was as follows:—There was a widow and a son who had been adopted by the husband in his lifetime. During the lifetime of that son, two-thirds of the ancestral property was alienated; the son then died, and the widow, who had been given power to adopt by the deceased husband, then adopted another son. At the time of the adoption the natural father entered into an agreement that the adopted son should not challenge the alienation which had been made. When that son came of age, he entered into an agreement which the Board held was a ratification of the agreement made by his natural father. The general question is dealt with at page 208:—

"How far the natural father can by agreement before the adoption renounce all or part of his son's right so as to bind that son when he comes of age is also a question not altogether unattended with difficulty, although the case of *Chutko Raghunath Rajadiksh* v. *Janaki* (5) certainly decides that an agreement on the part of the father that his son's interests shall be postponed to the life interest of the widow is valid and binding. In this case their Lordships think it enough to decide that the agreement of the natural father which has been set out was not void, but was, at the least, capable of ratification when his son became of age."

It seems impossible to hold, as some seem to have held, that this is inferentially a judgment on the general question. The whole point there was that, however the general question stood, there was an agreement which was not void in the sense of being an agreement that was *funditus* null, *e. g.*, an agreement that marriage should be for a limited period, and that, therefore, as there was ratification, there was no need to decide the general question.

The other case was that of *Bhaiya Rabidat Singh* v. *Indar Kunwar* (6). The facts were that a widow, with

4. (1879) L R 6 I A 196. 5. (1874) 11 Bom H C R 199.
6. (1888) L R 16 I A 53.

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power to adopt, adopted a son and at the same time she obtained a document from the natural father consenting to her being in possession of the whole property during her lifetime. The suit was raised by the nearest relatives to declare the adoption invalid. The Board held that the adoption was duly performed and was recorded in a deed of adoption which made no mention of any condition. No other deed could, therefore, affect the adoption, but Lord Macnaghten, in the course of his judgment, said:—

"It is difficult to understand how a declaration by [the natural father], or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined"

It is clear that there is here no judgment on the point, for the judgment merely declared the adoption valid and did not determine any case between the widow and son, but Lord Macnaghten's dictum shows an obvious leaning to the view that an agreement by the natural father should not prejudice the right of the adopted son. It follows, as already said, that the question is not absolutely decided by any judgment of this Board.

Their Lordships will therefore turn to the numerous decisions in India. It will be convenient to take the Madras and Bombay decisions separately. But first it will be well to point out that there are distinctions to be drawn between the various cases that arise, but whether these distinctions create any difference in principle is another question. The distinctions to be drawn are these: First, whether the agreement, which is *ex hypothesi* always made by the natural father, and is also *ex hypothesi* an agreement, but for which the adoption of the son would not have taken place, is made with the adoptive father, who is the unfettered owner of the whole property (the fact in the present case), or whether it is made with the widow, who has got from her deceased husband a power of adoption, but who only herself possesses a widow's estate. Second, whether diminutions of the right of the adopted son go only to protect and define in quality the widow's estate, which ordinarily by adoption would be swept away, or whether they go farther and give part of the ancestral property to persons outside the family altogether.

It will be convenient to deal with the Bombay cases first, as they begin at the earlier date. *Vinayak Narayan Jog* v. *Govindrav Chintaman Jog* (7). In this case, by a will, the

7. (1869) 6 Bom. H C R 224.

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testator, who was a separated person, divided his property practically into two parts, and gave one to his widow absolutely and the other to his adopted son. The son was a nephew, and it was found that the whole arrangement was known to all members of the family. It was acquiesced in by the natural father of the boy. The High Court held that the provision for the adopted son was adequate and that the will could not be challenged by the adopted son. The judgment went on two grounds. First, that although an alienation of the whole estate would be bad and inconsistent with the duties cast upon an adopted son, still, if the provision was adequate, there was no reason why it should not stand. Second, that as the adopted son proposed to take what he could under the will, he could not, on the principle of approbate and reprobate, refuse to acknowledge its validity. It is to be observed that this second view scarcely does justice to the opposing argument. The son did not propose to take his half under the will; he proposed to take the whole in right of his position as a son. There is, however, one other sentence which would seem to point to the right of the testator to make an adequate provision for the widow instead of allowing her life interest to be entirely destroyed by the adoption.

Chitko Raghunath Rajadiksh v. *Janaki* (5). This was an adoption by a widow, subject to a stipulation that the widow should enjoy the whole property during her life, giving the boy maintenance. *Held* a good stipulation. Haridas, J., puts it partly on what may be called conditional adoption, a view which it is hard to agree to, and partly on approbate and reprobate. To the argument that it was a condition repugnant to Hindu law, he says that there is no text to that effect. Westropp, C. J., in *Radhabai* v. *Ganesh Tatya Gholap* (8), *obiter*, takes these two cases as deciding the general point.

After this case in date comes the case before this Board *Ramasawmi Aiyan* v. *Venkataramaiyan* (4).

Accordingly, in *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (9) it was sought to urge that this Board's decision had overturned the authority of the former cases, because their Lordships held that the general question was still open. The facts were practically the same as in the first case, *i. e.*, adoption by a widow and a contemporaneous agreement with

4. (1879) L R 6 I A 196. 5. (1874) 11 Bom. H C R 199.
8. (1878) I L R 3 B 7 at 8. 9. (1887) I L R 11 B 381.

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the natural father that the widow should have full enjoyment for her life. There is a long and very careful judgment by Farran, J. It is too long to quote in full, but may be summarised thus:—The early Bombay Shastris or Pundits were logical in holding the strict view. But custom and practice may modify the strict view. The possibility of such an agreement is in no way negatived by a direct text. Fair arrangements for protection of the widow's interest are commonly made and supported. He then prays in aid the judgment of this Board *Ramasawmi Aiyan* v. *Venkataramaiyan* (4) but here their Lordships think he is somewhat misled as to the sense in which the word "void" was used. Then, after saying that it is the general law that the guardian of an infant can bind the infant when the contract is made *bona fide* for his interest, he sums up the matter thus:—

"I cannot but think that this principle ought to guide the Court in considering whether agreements like the one under consideration can be upheld or not. If the stipulations are unreasonable, such as giving to the widow an absolute power of disposition over the property, they should be rejected as *ultra vires* of the father; if reasonable, such as only to define a limit of the son's enjoyment of the property, then they should be upheld. The reasoning in the judgment of the Court in the *Chitko* case (*supra*) goes far beyond this view, but the actual decision of the Court is in accordance with it."

Basava v. *Lingangauda* (10). This was a case where the man who adopted a son conveyed by a deed of gift, which was referred to in the deed of adoption, part of the ancestral property to his daughters, and the natural father was a party to the deed of adoption. *Held*, that the deed of gift was good and binding on the adopted son. The case is taken as plain, and not argued.

The next case is *Vyasacharya* v. *Venkubai* (11). The facts were: Adoption by a widow and a gift of part of the property to her own daughters. Assented to by the natural father at the time of the adoption. Beaman and Heaton, JJ., referred to a Full Bench the general question: "Whether the terms of an agreement entered into between the natural and adoptive parents as conditions of the adoption are binding upon and can be enforced against the adopted son?" but they added that, if that question was too wide, it ought to be

4. (1879) L R 6 I A 196. 10. (1894) I L R 19 B 428.
11. (1912) I L R 37 B 251 (F B).

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considered in the light of the facts of the case. This was the view taken by the Full Bench, Scott, C.J., Chandavarkar, Batchelor and Rao, JJ. They held that "an agreement by which the adoptive widow is to be allowed to retain her life interest, notwithstanding the adoption, differs in fact and in principle from an agreement under which a power is conferred upon her which, as a widow enjoying a life estate, she could by no other means obtain." On the facts, therefore, they held the agreement not binding, holding, first, that the condition was unreasonable and took the test proposed by Farran, J., and, second, that it was covered by a case of *Venkappa* v. *Fakirgowda* (12) where a widow was given power to give the property to her own brother, and the condition was held to be bad.

Then came the case of *Balkrishna Motiram* v. *Uttar Narayan Dev* (13). This was a gift of an annual sum as a charge on the ancestral property for a charity made by the adopting father and agreed to by the natural father at the time of the adoption. The gift was held bad. Hayward, J., delivering the judgment, examined the cases and sums up thus:—

"It would appear to have been established by these decisions that agreements for reasonable provision for widows ought to be upheld as valid according to general custom modifying the strict terms of Hindu law. But no authorities have been quoted before us in favour of any other persons in such connection or in support of a general extension of the modification so as to include, as here claimed, reservations in favour of charities and religious endowments."

To sum up the Bombay cases. As a question of actual decision, the Courts have always upheld the grant to the widow of her interest for life, and that whether the stipulation had been made by the husband while still alive, or by herself, it being always the case that the agreement was anterior to or contemporaneous with the adoption itself, and that the natural father concurred. But when the gift is to outsiders it has been held invalid, and that whether made by the widow or the adopting father himself. The reasons given have varied. Some have put the deviation from strict principle on custom, some on the view of approbate and reprobate, and in one case upon the view that the father as guardian can bind an infant by any contract which is for his benefit.

To turn now to Madras.

12. (1906) 8 Bom. L R 346. 13. (1918) I L R 43 B 542

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Lakshmana v. *Lakshmi Ammal* (14). There is at page 163 a general remark by Turner, C. J., against the validity of conditions imposed by agreement with the natural father, but the remark is based on an erroneous view of the judgment of this Board in *Ramasawmi Aiyan* v. *Venkataramaiyan* (4) and is really of no authority. The case itself turns on a speciality.

Lakshmi v. *Subramanya* (1). This was a case where the adoptive father stipulated that certain lands should be enjoyed by the widow for life. This was agreed to by the natural father. It was held binding. The reasons given by the learned Judges were dissimilar. Muthusami Aiyar, J., held that this was just an arrangement for fixing maintenance. Shephard, J., held that the father, being at the moment undisputed owner of the property, could do what he liked with it, and that the effect of what he did was really to withdraw that portion of the ancestral property. He repudiated the idea of reasonableness being a test.

Narayanasami v. *Ramasami* (15). This was precisely the same case as the last and, being decided by the same Judge, Shephard, J., followed the last case, the other Judge simply following the decision and not going into the reasons.

Jagannadha v. *Papamma* (16). This was a case of adoption by a widow. The agreement was that the widow was to have half the property. Collins, C. J., and Handley, J., held the agreement not binding. They rested on Lord Macnaghten's dictum in *Bhaiya Rabidat Singh* v. *Indar Kunwar* (6) and distinguished this from the case *Lakshmi* v. *Subramanya* (1) in their own Court by which they were bound on two grounds, that in that case the arrangement was by the father himself, whereas here it was by the widow.

Ganapati Ayyan v. *Savithri Ammal* (2). This was a disposition in charity by the adoptive father, who at the same time gave his widow power to adopt. She adopted; the natural father acquiesced. *Held* binding. Shephard, J., held that it had been settled by *Lakshmi* v. *Subramanya* (1) and *Narayanasami* v. *Ramasami* (15). Subramania Aiyar J. agreed.

Visalakshi Ammal v. *Sivaramien* (3). Adoption by a widow. Agreement come to by natural father that, in the

1. (1889) I L R 12 M 490. 2. (1897) I L R 21 M 10.
3. (1904) I L R 27 M 577 (F B). 4. (1879) L R 6 I A 196
6. (1888) L R 16 I A 53.
14. (1881) I L R 4 M 160. 15. (1890) I L R 14 M 172 : 1 M L J 39.
16. (1892) I L R 16 M 400 : 3 M L J 193.

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event of disagreement between widow and adopted son, widow should enjoy half the property until her death. Referred to Full Bench. The order of reference drawn by Subramania Aiyar, J., contains a weighty argument in favour of what may be called the strict view. He argues:—

1. That there is no reason against an adoptive father doing anything in a question with an adopted son which he could have done with a natural son.

2. That if the adoption by a widow takes place after the death of the adoptive father, all the provisions of the adoptive father will stand, because the will speaks at his death and takes out of the property whatever is dealt with before the adoption takes place.

3. But further than that the arrangement cannot go, because it is allowing the adoptive father, or the widow, to do something which is incompatible with the proper position of an adopted son.

4. That it is just as impossible for the natural father to do, on behalf of the son to be adopted, anything as regards what is to happen after the adoption as it is for the adoptive father to have acted as to his rights before adoption.

5. Approbate and reprobate cannot apply, for that implies election, and there is no election open to the adopted son. If, on the contrary, it is looked on as a condition, this condition is repugnant and must be disregarded.

The result must be to hold the present case not binding.

But, before the Full Bench, Benson, Davies, and Russell, JJ., all concurred in thinking that *Ramasawmi Aiyan* v. *Venkataramaiyan* (4) indicated that the natural father was not incapable of giving a consent. If that is the position, the only question that remains is, Is it fair and reasonable?—that is to say, Is it for the minor's benefit? Then take Farran's, J., test as to the power of the father. They point out that there is no authoritative text forbidding such an arrangement. They consider a fair and reasonable disposition not inconsistent with Hindu Law, and therefore they upheld the arrangement.

To sum up the Madras cases. As regards decision, the general result has been to validate the arrangements so far as provision is made for the widow, just as in Bombay, but one case, *Jagannadha* v. *Papamma* (16), is the other way, and the

4. (1879) L R 6 I A 196. 16. (1892) I L R 16 M 400 : 3 M L J 193.

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referring judgment of Subramania Aiyar, J. is also of that way of thinking. As regards reasons, again they vary, some going on the power of the adoptive father to do what he likes, some on fair and reasonable arrangements, and some on approbate and reprobate.

It will be apparent from this examination that it is not possible to reconcile all the decisions, and still less the reasons on which they have been based. Their Lordships will, therefore, examine the matter on principle. When a disposition is made *intra vivos* by one who has full power over property under which a portion of that property is carried away, it is clear that no rights of a son who is subsequently adopted can affect that portion which is disposed of. The same is true when the disposition is by will and the adoption is subsequently made by a widow who has been given power to adopt. For the will speaks as at the death of the testator, and the property is carried away before the adoption takes place. It is also obvious that the consent or non-consent of the natural father cannot in such cases affect the question. But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from adoption are immediate, and the disposition, if given effect to, is inconsistent with these rights and cannot of itself *vi propria* affect them. There are two propositions so well settled that no authority need be cited. They are, first, that the natural father loses all power over the son from the moment when he is adopted, and, second, that the adopted son has in his new family precisely the same rights as a natural son, save only when the question is one that raises a competition between the natural and the adopted son Can, then, the consent of the natural father who judges, and, *ex hypothesi*, rightly judges, that it is more expedient for the boy to be adopted, even though his rights are limited, than not to be adopted at all, make any difference? The doubt expressed by Lord Macnaghten in *Bhaiya Rabidat Singh* v. *Indar Kunwar* (6) seems unanswerable. How can the consent of the natural father take any effect on the rights of the boy which only arise when his rights as a natural father are non-existent? But if the father cannot do it by virtue of any power in himself, can he do it as guardian of the infant so as to bind him? Farran, J., who is an exponent of this

6. (1888) L R 16 I A 53.

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view in the case of *Ravji Vinayakrav Jaggannath Shankarsett* v. *Lakshmibai* (9) was curiously misled by an undue veneration for Mr. Mayne. He quotes a sentence from Mr. Mayne's work as follows:—

"He (the minor) will also be bound by the act of his guardian when *bona fide* and for his interest and when it is such as the infant might reasonably and prudently have done for himself if he had been of full age."

This quotation is from the third edition of Mayne's work, and as a universal proposition is obviously unsound. Accordingly, in the fourth edition, which was published soon after the date of the judgment in question, and in all subsequent editions, Mr. Mayne inserted between the words "guardian" and "when *bona fide*" the words "in the management of the estate," which turns an inaccurate proposition into an accurate one. But it is no longer of service to Farran, J., in the matter in hand, for assuredly the natural father is not managing the estate of his child when the estate referred to is the estate which he will only get after adoption by another person. Therefore, reverting again to Lord Macnaghten's dictum, it seems impossible to ascribe any value to the guardianship power of the natural father to bind the son as to property in which he cannot have an interest until the time when the guardian has ceased.

Next, can the case be solved by the doctrine of approbate and reprobate? Their Lordships think clearly not, for the doctrine of approbate and reprobate assumes election, and the adopted son has no election. He cannot undo the adoption and be as he was. The same fact destroys the idea of conditional adoption. The adoption cannot be undone; it cannot, therefore, be conditional.

It will be seen from these views that in their Lordships' opinion the only ground on which such arrangement can be sanctioned is custom. They are of opinion that there is such a consensus of decision in the cases with the exception of the case of *Jagannadha* v. *Papamma* (16) that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the right of the widow as against the adopted son. It seems part of the custom that one *sine qua non* of such an arrangement should be the consent of the natural father. But if this is looked at

9. (1887) I L R 11 B 381.
16. (1892) I L R 16 M 400 : 3 M L J 193.

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narrowly, it is only because it is a part of the custom that it is either here or there. This leads to the remark that there is a good deal of looseness in the discussions in the judgments as to reasonableness. Some look at it from the point of view if whether, in view of the adoption only being granted on condition of the arrangement, this is, in the circumstances, reasonable for the boy. It would seem that it might well be assumed that if a natural father consented to give his son in adoption, he would only do it if it were reasonable, *i. e.*, for the boy's benefit in the circumstances. Others look at it from the point of view whether the adoption will put the boy in a reasonable position, *i. e.*, not subject him to the duties of a son to do worship for his adoptive father without giving him sufficient advantages to enable him to do so. But the consensus of judgments seems to solve these two questions in this way, namely, that the consent of the natural father shows that it is for the advantage of the boy, and that the mere postponement of his interest to the widow's interest, even though it should be one extending to a life interest in the whole property, is not incompatible with his position as a son. Their Lordships are, therefore, prepared to hold that custom sanctions such arrangements.

As soon, however, as the arrangements go beyond that, *i. e.*, either give the widow property absolutely or give the property to strangers, they think no custom as to this has been proved to exist and that such arrangements are against the radical view of the Hindu law. Their Lordships are, therefore, against the idea of a general proposition that all arrangements consented to by a natural father, and of benefit to the boy in the sense that half a loaf being better than no bread, he is better with an adoption with truncated rights than with no adoption at all, are valid. They would further say that the remark made by some learned Judges that there is no text prohibiting such arrangements seems to them to go exactly to the opposite effect. Inasmuch as what is sought to be done is admittedly contrary to the strict and natural view of the Hindu law as to the true position of the adopted son in his new family, it would seem more to the point to say that there is no text which sanctions any contrary arrangement.

Applying these views to the present case, it follows that their Lordships consider that the will here can have no effect, and that the appeal must be allowed and the suit dismissed.

The appellant must have his costs before this Board and in the Courts below.

Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant : *H. S. L. Polak.*

Solicitors for respondents : *Douglas Grant* and *Dold.*

H. C. *Appeal allowed.*

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PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT :—LORD PHILLIMORE, LORD WARRINGTON OF CLYFFE AND SIR JOHN WALLIS.

Vertannes and others ... *Appellants**

v.

Robinson and another ... *Respondents.*

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Vertannes v. Robinson.

Will—Construction— "Effects"— Immoveable property—Executor's power—Conveyance after estate wound up—Estoppel—Indian Evidence Act (I of 1872), *Ss.* 115, 116*—Probate and Administration Act (V of* 1882),*S.* 4.

A Christian's will, appointing his wife executrix, devised to her specified immoveable properties "and all my household furniture, carriages, horses, chattels and effects, and all moneys and debts due and owing to me which I shall be possessed of at the time of my death." He died in 1897 possessed of other immoveable property besides that mentioned in the will—the subject-matter of the suit. His widow proved the will, administered the estate, sold the houses specified in the will, and by 1904 had paid off all debts including a mortgage on the other immoveable property. In 1918 she conveyed the latter to the plaintiff-respondent in discharge of an equitable mortgage with which she had charged it, and he agreed to let it to the eldest son for a year. In 1920 he sued in ejectment the widow and children still in occupation.

Held (1) that on a true construction of the will the word "effects" did not include immoveable property, and that therefore there was an intestacy as to it;

(2) that the widow had no title to convey the property in suit as the estate had been wound up and her neglect in not transferring the various shares to the children did not confer on her a title nor give a good title to one who took from her with knowledge of the terms of the will.

Bijraj Nopani v. *Pura Sundary Dassee,* (1914) L R 41 I A 189 : 27 M L J 93 (P C) distinguished.

(3) that the eldest son was under S. 116 of the Indian Evidence Act, 1872 estopped from denying the title of the plaintiff as landlord, but that the younger children were not estopped by S. 115 of that Act, by various acts of acquiescence as they and the plaintiff had acted under a common mistake as to the widow's right to convey.

Kuverji v. *Babai,* (1890) I L R 19 B 374 approved.

Decree of the High Court reversed.

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*P C Appeal No. 17 of 1926. 31st March, 1927.

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Vertannes v. Robinson.

Appeal from a decree of the Rangoon High Court reversing a decree of the District Judge of Insein.

The facts appear in the judgment reported below.

Dunne, K. C. and *E. B. Raikes* for appellants.

Sir George Lowndes, K. C., Vaisey, K. C. and *Leach* for first respondent.

31st March, 1927. The Judgment of their Lordships was delivered by

Lord Phillimore

LORD PHILLIMORE.—The narrative in this case is to the following effect. Sarkies Vertannes was an Armenian Christian practising as a solicitor in Rangoon. In 1886 he made his will, and the material part is as follows:—

"This is the last Will and Testament of me Sarkies Vertannes of No. 68A, Halpin Road, in the town of Rangoon, British Burma. I do hereby appoint Mary my wife the sole executrix of this my will. I do hereby revoke all wills and dispositions heretofore made by me, and do publish and declare this to be my last will and testament. I give and devise and bequeath my three houses numbered respectively 68, 68A, 68B, in Halpin Road, in the said town of Rangoon, together with land thereto belonging and all the out-offices and buildings standing thereon, and all my household furnitures, carriages, horses, chattels and effects, and all moneys and debts due and owing to me which I shall be possessed of at the time of my death unto my said executrix absolutely."

He died in May, 1897. At that time he was possessed of other immoveable property besides that mentioned in his will —namely, certain land at Kokine in a suburb of Rangoon—and it is concerning this land that the dispute has arisen.

His widow obtained probate of the will and administered the estate, sold the three houses in Halpin Road which are specified in the will, paid all the debts including a mortgage on the Kokine land and was left finally with this land free from incumbrances and Rs. 19,000 in August, 1904.

The family then moved to the Kokine land and have resided there ever since, none of them having married. The eldest son died in 1917 intestate.

There is valuable brick earth upon the Kokine land, and the widow embarked on a brick-making business in which she was assisted by her eldest son as long as he lived.

The second son, who is the first defendant in the suit, came to England and acquired a call to the Bar, returned to Rangoon in 1900 and has practised as a barrister there ever since. The widow is the second defendant. The third defendant is the one daughter. She was of full age before 1904 and carried on a dairy business on the same land.

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The fourth and fifth defendants were boys at the time when the family settled at Kokine. The fourth defendant was, for a short time, in the Port Commissioners' Office and then volunteered for service in the war, and was absent from January, 1915, till February, 1922. The fifth defendant is in a mercantile office at Rangoon. This completes the family.

The widow appears to be a masterful aand capable woman. She is stated to have helped her husband in his legal work, and she took full control of the family and of the property. It is probable that she thought that the Kokine land had been devised to her by virtue of some of the general words in the will; but it may be that she accepted the position that there was an intestacy as to these lands, and that her beneficial interests were limited to her widow's share, and that she notwithstanding had as executrix full power of disposition. Which view her children took is uncertain.

The first defendant, who ought to have known as much law as his mother, says, in his deposition, that he always thought that there was an intestacy as to this land, but that his mother convinced him that as executrix she had full power of disposition. Whether this be a correct statement of what passed between them and of his original view of the situation, is somewhat uncertain. But the point becomes immaterial.

The younger children certainly acquiesced in the assertion by the mother of her full right of disposing of the property, very likely without minute enquiry as to the origin of this right. But they all deposed that they always believed that they had shares in the land. Nothing appears as to the view taken by the deceased son.

Though it is said that very good bricks were made, the business was not carried on at a profit; or, perhaps, it should be stated that it was not carried on at such a profit as to maintain the widow and to maintain the children so far as they were not maintaining themselves; and the widow began a course of borrowing on mortgage—probably in the first instance to purchase plant for the business.

On the 3rd November, 1904, she mortgaged the property to a Chetty to secure Rs 20,000. The deed contains no recital of the will or of her title as executrix. It was made by her as if she were absolute owner. The first defendant, however, joined in it as a surety. He thus became aware of its contents, and if he really, at the time, thought that there was an intestacy as to this property, it is remarkable that he, being

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a barrister, should have allowed the deed to take the shape which it did.

On the 15th November, 1905, this mortgage was paid off, and a fresh mortgage given to the Burmah Building and Loan Association, Limited for Rs. 30,000. The first defendant was not required to act as surety in this transaction.

On the 1st February, 1909, the Burmah Building and Loan Association, Limited assigned its mortgage to the firm of Robinson and Mundy, in which the present plaintiff, Mr. Robinson, was one of the partners. The firm were engineers and contractors and purchasers of the bricks. The widow was one of the attesting witnesses to this assignment, and presented it for registration. Shortly after this, the firm of Robinson and Mundy were requested by the widow to make further advances, and began, on the 6th January, 1910, with an advance of Rs.800; and seventy-three further receipts for similar advances—all for comparatively small sums—and certain promissory notes were produced at the trial.

Early in 1916 Robinson and Mundy dissolved partnership, and the debt due from the widow was agreed to be assigned to Robinson.

By deed dated the 17th February, 1916, Robinson and Mundy reconveyed the property to the widow; but the plaintiff Robinson kept the title deeds to secure an equitable mortgage for the debt, which was reckoned up on the 1st April, 1916, as amounting to Rs. 91,600. The widow also gave a promissory note for this sum to the plaintiff.

On the 21st April, 1917, the plaintiff required his money, and wrote to the first defendant to say that he must tell his mother that if the interest due was not paid off he would call in the whole of the loan. The first defendant states that this came as a surprise to him, and that he had no idea of the extent of his mother's borrowing till he then came to inquire.

However this may be, negotiations by the first defendant and his mother with the plaintiff then began. They resulted in an agreement of the 9th May, 1918, between the three, whereby the widow, described as the mortgagor, agreed to transfer forthwith absolutely to the plaintiff the land, the bricks, and the brick-making plant. The plaintiff agreed not to sell the property for a year, though he was to be allowed to sell bricks or any part of the plant. He agreed to convey the property to the mortgagor or to any person she might name for the sum of

Rs. 109,660, which was agreed as the then existing amount of debt.

The plaintiff agreed to let the premises to the first defendant, who was described in the agreement as the bailee, for twelve months from the 1st May at the rent of Rs. 150 per month. There were some other provisions not necessary to relate. Of even date with this agreement was a conveyance of the property in the ordinary form by the widow to the plaintiff, the consideration being the release of the debt.

When the year came to an end, the first defendant asked to be allowed to continue tenant, and was allowed to remain on for a time from month to month. Towards the end of 1919 the plaintiff's representative entered upon the land for the purpose of making bricks, but the family remained living there, and the dairy business was kept on.

On the 14th May, 1920, formal notice to quit at the end of the month was sent to the first defendant, and this was countered by a lawyer's letter sent on behalf of the three younger children objecting to the plaintiff manufacturing bricks and injuring the property, and claiming shares in the land as heirs of their father, stating further that they had been in occupation since his death.

Thereupon on the 17th September, 1920, the plaintiff brought suit.

By his plaint the plaintiff averred that the property had passed to the widow by the will of her husband, that probate of the will had been obtained by her as executrix, that she lived on the land with her children, had mortgaged it and finally conveyed it to him. He related the circumstances of the lease to the first defendant and payment of rent up to a certain date, and put the other defendants in the position of persons living on the premises during the tenancy by the leave and licence of the first defendant, then stated the notice to quit and the contention raised by the third, fourth and fifth defendants, and claimed ejectment, possession, rent in arrears, mesne profits and costs.

The second defendant put in no defence. The first defendant by his written statement set up his father's intestacy as regards this property and his claim as one of his sons to a share in it, and said that he entered into the agreement of the 9th May, 1918, under the mistaken belief that his mother as executrix had power under the Indian Succession Act to mortgage and sell the property. He contended, therefore, that he

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had attorned tenant under a mistake as to the plaintiff's legal position, and that he was entitled to resist ejectment.

The third and fifth defendants delivered a joint statement setting up the intestacy, saying that they and the fourth defendant had lived upon the land in their own right and denying all knowledge of the transactions between the plaintiff, the first defendant and their mother. The fourth defendant delivered a written statement substantially to the same effect.

When the issues came to be settled, the plaintiff asked for an issue No. 11 in the following words:—

"Are the defendants or any of them estopped from disputing the plaintiff's title by the provisions of Sections 115 and 116 of the Evidence Act?"

This was allowed on terms that he gave particulars of the estoppel which he relied upon; and these particulars, as will appear later, are of importance.

When the case came to trial, three questions arose: the first turns on the construction of the will; the second upon the power of the widow if she was not devisee under the will to sell the property as executrix; and the third as to the alleged estoppel of the defendants, or, as it might otherwise be put, their conduct disentitling them to equitable relief.

The District Judge came to the conclusion that the will did not pass the Kokine land, and that the widow did not convey the land as executrix, but that the conveyance was nevertheless valid, subject to the right of the children if they were not estopped by conduct or otherwise to charges on the land for the value of their shares.

He held that the first defendant was estopped from disputing the landlord's title under S. 116, but that none of the defendants were estopped under S. 115.

He therefore gave a decree for ejectment of all the defendants and delivery of possession of the land and premises to the plaintiff, who was to have possession subject to charges for such distributive shares under the Indian Succession Act as the first, third, fourth and fifth defendants should be able to substantiate in properly instituted proceedings; and a decree for mesne profits against defendant No. 1, with costs against defendants Nos. 1 and 2.

Both sides appealed from this decision, and the Judges in the High Court differed in opinion from the District Judge. They thought that the word "effects" in the will was sufficient to pass the Kokine land to the widow, and that if it were otherwise the first, third and fifth defendants would be estopped by

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conduct. They agreed with the District Judge in thinking that the first defendant was also estopped as tenant, and that the fourth defendant was not estopped by conduct. On the whole, they granted the plaintiff the decree which he sought for and dismissed the appeal of the first, third, fourth and fifth defendants with costs.

It is from this decision that these four defendants have appealed to His Majesty in Council.

Upon the first point—that of the construction of the will—their Lordships agree with the District Judge and are not of the opinion of the Judges in the High Court.

No doubt the word "effects," like many other words of general and indefinite meaning, may be sufficient in a certain context to pass immovable as well as movable property. Further, it was rightly submitted by counsel for the respondent that if this would be so in Great Britain, it would be so *a fortiori* in India, where there is little distinction between moveable and immovable property when matters of succession have to be considered.

But the context in this case is not capable of such a construction. After the specific devise of the three houses in Halpin Road, the will proceeds "and all my household furniture, carriages, horses, chattels and effects . . . which I shall be possessed of at the time of my death." It does not say "all other." The words "which I shall be possessed of at the time of my death" refer solely to "the household furniture, carriages, horses, chattels and effects." And after the specific reference to the Halpin Road property, it is not lightly to be inferred that the testator intended that his other lands, whether then owned by him or to be acquired thereafter, should pass by general words, as such general words.

A number of cases were cited by the District Judge in which the word "effects" appears in the will and in some of which the word was held sufficient, in others insufficient, to pass land. Primarily, no doubt, the word refers to personal estate or movables.

At their Lordships' bar, counsel further relied on two authorities, *Hogan* v. *Jackson* (1) for the special expression of Lord Mansfield's opinion and *Attorney-General for British Honduras* v. *Bristowe* (2) for the language. No doubt in the first of these cases Lord Mansfield did say that the word "effects" was enough to pass the freehold interest in land. But

1. (1775) 1 Cowp. 299 at 304. 2. (1880) 6 App. Cas. 143 at 149.

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the words of the devise were "all the remainder and residue of all the effects both real and personal which I shall die possessed of"; and the only plausible suggestion for a meaning of "real effects" if they did not carry freehold land, was that they should be limited to chattels real which in the context was most unlikely.

In the case of *Attorney-General for British Honduras* v. *Bristowe* (2), one Grant, who carried on an enterprise called "Grant's Work," cutting log wood on a particular piece of land under licence from the Spanish Government, ultimately after a series of circumstances, came to acquire a holding title to the land itself. He, by his will, after denouncing the evil effects of slavery, manumitted all his negro slaves, making them subject to certain legacies, and in order that they might be able to pay these legacies off, left to them "and to their heirs and assigns, all my effects of what kind soever I may have in the Bay Honduras, money in Great Britain or elsewhere; my lands and effects in Jamaica excepted." He proceeded to establish regulations for the government of the slaves as a community, and, in the opinion of their Lordships, evidently intended that the slaves should enjoy the land and undertaking as a community under the regulations which he laid down by his will. This case is far removed from that which their Lordships now have under consideration and cannot help the respondent.

Their Lordships can accept the view of the High Court that effects might include real estate, and that the words "due and owing to me" only qualify the words "moneys and debts" and may be omitted for the purpose of construction. But even so, they cannot hold that there is any indication of the testator's intention to devise any land which he had or might hereafter have beside the Halpin Road property.

The first point being, therefore, disposed of in favour of the appellants, the next question turns on the power of the widow to convey this property as executrix. By S. 4 of the Probate and Administration Act, all the property of the deceased vested in the executrix as such, and if it had been necessary in the course of winding up the estate to part with or charge this property, the executrix could have made a good title. But the estate had been wound up by the year 1904, completely wound up, unless it be said that the executrix had not discharged her duty by transferring to the children their various shares. Her neglect to discharge that duty did not

2. (1880) 6 App. Cas. 143.

confer on her a title nor give a good title to one who took from her with knowledge of the circumstances, and inasmuch as the plaintiff knew of the will and had taken legal advice upon its construction, he must be deemed to have been aware of the infirmity of the title of the widow.

The case of *Bijraj Nopani* v. *Pura Sundary Dassee* (3) was cited on behalf of the plaintiff; but in that case the property was charged with two annuities and had then been mortgaged to pay the cost of past litigation, and the mortgage was being called in, and so the property had to be sold, and the executor was the proper person to make a good title. The doubt in the case arose because it happened to be the fact that the executor was one of the sons of the daughter of the testator, and that both his two brothers were also parties to the conveyance as grantors to the exclusion of their sisters, while in law the sons of the testator's daughter were not the heirs, and had no interest to convey, because the daughters took their mother's stridhan. The contention raised against the validity of the conveyance was that it was made by people who had no title, but their Lordships thought that whatever might be the impression under which the vendors conveyed, the one of them who was executor could make a good title to a purchaser for value. The head note of the report is unfortunately misleading. It describes the executor and his brothers as having beneficial interests in the property, whereas in fact they had no such interest.

In their Lordships' view the plaintiff cannot here rely upon the conveyance by the executrix being more than a conveyance of her own share or as passing the beneficial interests of the children.

The question of estoppel remains.

As regards the first defendant, his case seems concluded by S. 116 of the Evidence Act, which is as follows:—

"No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the licence of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such licence was given."

Upon this point both Courts below have come to the conclusion which commends itself to their Lordships.

3. (1914) L R 41 I A 189 : 27 M L J 93 (P C).

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The case of *Bilas Kunwar* v. *Desraj Ranjit Singh* (4) is an authority, if any were necessary, in support of the view that has been taken.

Their Lordships are therefore relieved from the necessity of considering whether this defendant might also be held estopped under the general provisions of S. 115, or whether, as counsel for the plaintiff preferred to put it, he was deprived by his conduct of a claim to equitable relief.

The case of the third, fourth and fifth defendants is different. It was, indeed, suggested that they also came under S. 116, because they were in occupation under the leave and licence either of the plaintiff or of his tenant, the first defendant. But their Lordships do not take this view of the facts. As regards estoppel properly speaking, when the particulars given by the plaintiff come to be considered, any such case disappears. There was no representation by these defendants to the plaintiff that the property was wholly their mother's, or that she had the title to dispose of it as executrix. If the plaintiff supposed that the property was the mother's, it was not by reason of any representations made by these defendants. It was a common error. He had as long ago as May, 1909, taken the opinion of counsel upon the construction of the will and had unfortunately received erroneous advice. Moreover, the dates given in the particulars for the supposed representations are too late. The plaintiff made no change in his position at or after those dates. He had committed himself to the advances to the widow long before. The case of *Kuverji* v. *Babai* (5), which was cited in the course of the argument, is a useful authority.

Counsel for the plaintiff appreciated this position, and submitted that it was not so much a case of estoppel as a case of parties seeking equitable relief who must do equity. In their Lordships' view, however, these defendants are not seeking equitable relief, but standing on their beneficial title. No doubt, to perfect their title, they, in strictness, might require conveyances of their shares from the executrix (S. 113 of the Probate and Administration Act not applying). But it is well known that except, perhaps, in the old Presidency towns, such niceties of conveyancing as transfers by executors of shares of lands are not in familiar use, and these appellants can at any rate as defendants rely on their beneficial title.

4. (1915) L R 42 I A 202 : 29 M L J 335 (P C)
5. (1890) I L R 19 B 374.

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Vertannes v. Robinson.

Lord Phillimore.

In their Lordships' view, these three defendants are entitled to succeed, but the first defendant is not so entitled.

Their Lordships will humbly recommend His Majesty that the judgments of the District Judge and of the High Court should be discharged, and that in lieu thereof the plaintiff should have a decree for ejectment against the first and second defendants, and that it be declared that he (the plaintiff) is entitled to one-third and one-quarter of the remaining two-thirds of the property in suit; and that the third, fourth and fifth defendants are each entitled to one-quarter of the two-thirds, with liberty to the plaintiff or to any one of these last three defendants to apply for a partition; that the plaintiff have judgment against the first defendant for his costs before the District Judge and in the High Court, and against the second defendant for his costs before the District Judge; and that the third, fourth and fifth defendants have their costs in the Courts below and the whole costs of this appeal before their Lordships. Their Lordships do not consider that the joinder of the first defendant has increased the costs of the appeal.

Their Lordships will further recommend that the cause be remitted to the High Court at Rangoon to act in accordance with these directions, with liberty to the parties to apply as they may be advised.

Solicitors for appellants : *Bramall and Bramall.*

Solicitors for respondents : *Waterhouse and Co.*

H. C. *Cause remitted.*

PRIVY COUNCIL.

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, LORD CARSON, LORD DARLING AND SIR LANCELOT SANDERSON.

[On appeal from the High Court of judicature at Bombay.]

Bhagchand Dagdusa Gujrathi and others ... *Appellants** *(Plaintiffs)*

v.

The Secretary of State for India in Council and another ... *Respondents (Defts.)*

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Bhagchand Dagdusa Gujrathi v. Secretary of State for India

Bombay District Police Act (IV of 1890), Ss. 25, 25-A, 26, 79—Tax or rate to defray cost of additional police—Award of compensation by Magistrate for damage caused by unlawful assembly—Irregularities in notification—Civil Procedure Code (V of 1908), S. 80—Suit against public officers—Prayer for injunction—Notice of suit essential.

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*P. C. Appeal No. 68 of 1925 27th May, 1927.

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Under the Bombay District Police Act, 1890, the action of the Government and the District Magistrate, in imposing a tax or rate to defray the cost of additional police employed in a disturbed or dangerous area, and for meeting the amount of compensation awarded for damage caused by an unlawful assembly, is essentially an executive or administrative, and not a judicial act. The Act prescribes no forms and few formalities. *Ezra* v. *The Secretary of State,* (1902) I L R 30 Cal. 36 at pp. 83, 84, 85 referred to.

The Police Act does not restrict the exercise of the taxing function of the Government and the District Magistrate to one occasion only, and the powers conferred by it are not exhausted by a single exercise.

Where there has been a *substantial* compliance with the provisions of the Police Act, mere irregularities in the form of the Notification issued by the Government do not vitiate the proceedings, and, in any case, errors and irregularities in the Notification are cured by S. 79 of the Act. But the provisions of S. 25, sub-section (4), with regard to the recovery of the cost of additional police through the agency of the Municipality, are mandatory, and until default is made by the Municipality, the Collector has no jurisdiction to take steps for the recovery of the tax. It cannot be a mere irregularity to disregard an express statutory prescription, however honestly or excusably, nor is a short cut permissible because the prescribed course promises little advantage.

The Police Act does not, as a condition precedent to action being taken under it, require proof of the active complicity of the inhabitants on whom the tax or rate is imposed. It is the essence of measures of this kind that one class has to pay for the misdeeds of another.

S. 80, Civil Procedure Code, 1908, applies to all officers of Government and to all their official acts, and imposes a statutory and unqualified obligation upon the Court. It provides for a fixed and obligatory interval of two months between the required notice and the commencement of any suit in respect of the official's action. The Act must be read in accordance with the natural meaning of its words S. 80 is express, explicit and mandatory; and it admits of no implications or exceptions. A suit in which *inter alia* an injunction is prayed is still "a suit" within the words of the section, and to read any qualification into it is an encroachment on the function of legislation.

In the case of suits against officials for acts purporting to be done in discharge of their duties, S 80 of the Civil Procedure Code is to be strictly complied with. It is applicable to all forms of action and all kinds of relief. The mere circumstance that part or whole of the relief claimed is an injunction does not oust the application of the section Decisions of the Calcutta, Madras and Allahabad High Courts approved.

The view taken by the Bombay High Court that "in the case of suits to restrain by injunction the commission of some official act prejudicial to the plaintiff, if the immediate result of the act would be to inflict hardship or irremediable harm, S. 80, Civil Procedure Code, does not compel the plaintiff to wait two months before bringing his suit", not approved.

The enactment of S. 80, Civil Procedure Code, is not *ultra vires*. *Moment's Case,* [(1912) L R 40 I A 48 : 24 M L J 459 (P C)] distinguished.

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Appeal (No. 68 of 1925) from a judgment and decree of the High Court, Bombay, (15th August, 1923), affirming a decree of the District Judge, Nasik.

The facts are stated in the judgment of the Judicial Committee. The case in the Court below is reported in (1923) I L R 48 B 87 and (1923) 26 Bom. L R 1, where the relevant sections of the Bombay District Police Act, 1890, are set out.

De Gruyther, K. C. and *Parikh* for appellants.

Sir George Lowndes, K. C. and *Kenworthy Brown* for respondents.

27th May, 1927. The Judgment of their Lordships was delivered by

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VISCOUNT SUMNER.—In this action forty-eight plaintiffs joined in suing the Secretary of State for India and the Collector and District Magistrate of Nasik for two kinds of relief, (*a*) a declaration that certain official notices and orders were *ultra vires* and invalid, and (*b*) an injunction permanently restraining all executive action thereunder. Unless the right to the first relief was made out, the prayer for the second necessarily failed. The suit was begun less than two months after notice of the intention to bring it had been given to the respondents. It was dismissed by the District Judge on all grounds, and by the High Court of Bombay as well, but, as to one of the learned Judges, not altogether on the same grounds. The plaintiffs now appeal.

In April, 1921, serious disorder occurred at Malegaon, in the District of Nasik, Bombay, connected with the Khilafat agitation, and in the consequent unlawful assemblies and riots there was loss of life and much damage to property. The Muhammadan weavers, who formed the large majority of the male inhabitants of the place, were the chief culprits, though it is not likely that they acted without instigation from other parties. Some persons were punished criminally, but the question remained how the injured parties were to be compensated and how order was to be maintained in the future. An inquiry was accordingly held, and amounts were fixed, by way of compensation to persons who had suffered in the riots. The Government decided to put in force the provisions of the Bombay District Police Act (IV of 1890), and orders were duly made for the employment of additional police at the expense of the inhabitants and for payment of compensation for the injuries

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sustained. Under these orders the income-tax payers, a small class, and the great body of the weavers were designated as the parties to pay the sums required. No question as to the correctness of these proceedings now arises.

Under the Act it was for the Collector to get in the amount of the compensation and for the Municipality of Malegaon to enforce payment of the police rate. Both were unable to do so. Coercion of the weavers generally, who had few belongings and lived in the main from hand to mouth, proved to be impracticable. As to the ratepayers, the Municipality lacked means of enforcing a general payment, and were openly set at defiance. By the spring of the following year the position had become exceedingly unsatisfactory. Some small sums had been collected from the income-tax payers but, in spite of much patience on the part of the executive and a lapse of time sufficient to have allayed the original turbulence, the measures taken under the Police Act had practically come to nothing.

Accordingly, in March, 1922, the District Magistrate of Nasik, who was Collector as well, proposed to the Commissioner for the Central Division that, instead of seeking to recover the amounts due for compensation from the weavers directly, a tax should be imposed personally on the merchants at Malegaon, who sold to the weavers the yarn for the saris, which they made, and bought from them their finished product. The amount of the tax in each merchant's case was to be measured by the amount of his dealings with the weavers during a period indicated. These merchants constituted a small class, likely to be easy to deal with, and many of them were weavers themselves. In the ordinary course, whatever they paid they would pass on to their customers by charging more for their yarn and giving less for the saris. It was unlikely that the weavers as a body could resist this readjustment, having no capital of their own and no means of quitting Malegaon to carry on their industry elsewhere. The magistrate was careful to point out that, if his suggestion was adopted, a modification would be required in the order of the 16th August, 1921, under which payment of the compensation had been imposed in terms on the Muhammadan weavers. The Commissioner passed this proposal to the Home Department, expressing his approval, and forwarding a copy of this approval to the Collector of Nasik. In April, 1922, the Government also approved the proposal and directed that the District Magistrate should be so informed, and, having thus dealt with the question of com-

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pensation, took up that of the expense of the extra police force. Here, too, it was decided to adopt the same plan, namely, to recover the sums outstanding from the shopkeepers, both Muhammadan and Hindu, who dealt in saris and yarn.

A notification, No. 152, dated the 6th June, 1922, was then published in the Bombay Government Gazette. This is the document which, with demand notices issued thereunder, the appellants by their prayer in this suit seek to have declared to be invalid and unlawful. It purports to be made by the Governor in Council and to direct, under S. 25, that "the cost of the additional police shall be defrayed wholly by a tax imposed on the Muhammadan income-tax payers, who are inhabitants of the said town, and by a rate, assessed on the property of such other inhabitants as are" notified in manner set forth, and under S. 25A that the above cost and the total amount of compensation awarded by the District Magistrate of Nasik should be assessed and recovered, first from payers of income-tax in certain amounts and instalments, and secondly:—

"The balance of the combined charges, after the amount recoverable from persons of Class I has been deducted, shall be recovered on behalf of the Momin adult weavers of Malegaon from both Muhammadan and Hindu shopkeepers of Malegaon dealing in saris and yarn, who shall pay every year up to 31st May, 1923, beginning from 1st July, 1921, a rate calculated by the District Magistrate, Nasik, at a sum not exceeding six annas, multiplied by the average number of saris hitherto purchased by them from Momin weavers of Malegaon annually, or a sum not exceeding Rs. 5, multiplied by the average number of bales of yarn hitherto sold by them to Momin weavers of Malegaon annually, as the case may be

"And, whereas the Municipality of Malegaon has made a default in the recovery of the charges on account of the said additional police, the Governor in Council is pleased to direct, under the proviso to S. 26 (1) of the said Act, that the recovery of the said charges shall be made by the Collector of the District along with the compensation money as an arrear of land revenue......"

The employment of additional police in consequence of the rioting, which caused the damage, and the compensation for the damage thus done, are respectively dealt with in S. 25 and S. 25A of the Act. It will be seen that the Act prescribes no forms and few formalities. The District Magistrate, with the Commissioner's previous sanction, fixes the proportions in which individuals are to make payments towards the compensation, which he has ascertained, for damage done and decides whether all the inhabitants of the local area affected or only particular sections or classes, and if so which, are to pay, and he then directs and requires the Collector to recover the amounts

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accordingly How the Commissioner's previous sanction is to be given and how the decision of the magistrate and his direction and requisition to the Collector are to be formulated, the section does not say. So with the additional police, though their employment in the first instance has to be directed by notification, the mode in which the cost is to be defrayed is to be simply directed by Government in accordance with sub-section 2 (*a*) and (*b*), and notification at this stage is not prescribed. Furthermore, in regard to each section, it is to be noticed that the determination of the incidence of the tax in question is an executive and not a judicial act. It is a function of the Government in the one case, and of the District Magistrate in the other, but in both cases its character is the same. Whatever may be said of the inquiry under S. 25A (1) A, into claims to be compensated for the damage sustained, the magistrate's action under S. 25 A (1) B is not a judicial proceeding, and there is nothing in the Act which requires that his action in this matter should be taken wholly on his own initiative or without instructions or recommendations from his superiors. (Cf. *Ezra* v. *The Secretary of State* (1)]. Even the Commissioner's sanction is only stated to be previous; it is not required to be given once for all. Nothing prevents it from being given from time to time or after consultation, nor is there anything about it which confines it to starting the magistrate on a course of action, which he is thereafter to pursue independently and alone.

There is furthermore nothing in either section to restrict the exercise of this taxing function to one occasion and one only. The powers which they give are not spent by a single exercise. The finality referred to in S. 25 A (4) relates exclusively to the Commissioner's function of review. The directions of the District Magistrate are not capable of being challenged otherwise than is thereby provided, but it is quite a different thing to say that the giving of one direction exhausts all the magistrate's powers and leaves him thereafter incapable of any substituted or amending action. Such a provision would be appropriate only to the judgment of a Court and not to administrative action such as this. Such a construction would tend to deprive the enactment of its practical utility.

On the Government Notification, No. 152, the appellants' contentions may be summarised thus. The Notification includes

1. (1902) I L R 30 C 36 at 83 to 85.

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in one document without distinction two separate matters—compensation for damage and the cost of additional police. In respect of the former it passes over the District Magistrate altogether, ousts his jurisdiction, and determines the incidence of the compensation tax by direct Government decree. Without discharging the orders previously made, it requires the collection of tax from Hindus and from shopkeepers, which under those prior orders had been imposed only on Muhammadans and weavers, a thing without legal warrant. Either the Government is making a new order, which is bad because it trespasses on the exclusive functions of the District Magistrate, or it is applying to his old order a new method of exacting the tax from persons, who are in terms outside the ambit of the old order as it stands. In the alternative, it constituted the shopkeepers agents for the weavers, contrary alike to fact and to law, and, under the strongest personal penalties in case of failure it called on them to pay on behalf of principals, who had neither authorised payment nor put them in funds to make it. The obvious explanation of the real intent of the Notification, which is furnished by the previous reports and communications, is brushed aside by the appellants on the singular plea that this written instrument, unlike others, is to be looked at in isolation from the circumstances, in which it was promulgated, and as a matter of construction is so drawn as to contain on its face two plain transgressions of the very Act, in pursuance of which it is expressed to be published.

It is, of course, easy to be wise after the event. It may be admitted that the notification would have been improved (a) by a statement that the new mode of raising the money was directed in lieu of the old one, the orders for which were *pro tanto* discharged, and (b) by the complete omission of any reference to the mode in which the shopkeepers might recoup themselves by adjustments of the prices of yarn and saris respectively. Probably the draughtsman could find ample excuse in the circumstances of a harassing period of office. At any rate, although the same notification includes both the cost of the police and the payment of compensation, the two matters are clearly severable, and the exercise of the powers of the Government under S. 25 is not prejudiced by the additional notification of the course, which the District Magistrate was about to take under S. 25 A.

The short answer, however, to all this is to be found in construing the document reasonably in the light of the exist-

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ing circumstaances, and by referring for the rest to S. 79 of the Act:—

"No . . . order, direction . . . or notification, made or published, and no act done under any provision herein contained, or in substantial conformity to the same, shall be deemed illegal, void, invalid or insufficient for any defect of form or publication, or any irregularity of procedure."

In the circumstances the meaning of the notification is obvious. As regards the cost of the additional police, the Government direction is actually expressed to be in supersession of those previous notifications dealing with the incidence of the payments, and the substituted incidence, which is in other words a new tax, is described alike for the police and for the compensation payments. Being, in fact, a substitution for the previous tax and sufficiently so described in the case of the police charges, it is, in their Lordships' opinion, a mere defect of form not to have reiterated the words showing expressly, as to the compensation charge also, that the taxing part of the notification is new. The same consideration applies to the fact that the Notification speaks of the total amount of the compensation having been awarded by the District Magistrate under S. 25 A and then goes on to speak of the mode of recovery as having been directed by the Governor in Council. Nothing in S. 25 A prescribes this part of the Notification at all, and to this extent it may be needless to refer to S. 79. The fact was that the Commissioner's previous sanction having been given (none the less regularly that he expressed it in two lines endorsed on the District Magistrate's letter to himself, of which he caused a copy to be sent to that official), the District Magistrate proceeded on the 12th June, 1922, to send to himself as Collector a requirement to recover payments from persons named, with particulars for calculating the amounts, which had been originally suggested by himself in principle and had now been determined by himself in detail. After this substantial conformity with the provisions of S. 25 A, their Lordships think that the errors in the Notification, if errors there were, do not matter.

The appellants, however, have contended that the whole proceeding was invalid because it involved the fundamental injustice of requiring a class of persons, not shown by any evidence to have been implicated in the riots, to bear a penalty, which ought rightly to have fallen only on those who were, and because agents were taxed instead of principals, for which the Police Act affords no warrant. The expression used in

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the Notification—"on behalf of the Momin adult weavers of Malegaon"—is made to play a large part in this contention.

It may be readily admitted that the words were not felicitous. They lend themselves to misunderstanding. On 21st April, 1922, the Sub-divisional Magistrate of Nasik had issued a notice to the people of Malegaon in which he stated that "the shopkeepers, who sell yarn to the Momins . . . are to be considered as agents for the purposes of recovery of these amounts." In itself this action was insignificant and it may not have been known to the Government when the Notification was issued, but the use of words, which seemed to support this notice, instead of words clearly negativing it, was unfortunate. What was meant, however, was that the shopkeepers were to be substituted for the weavers, as the section of the inhabitants to be charged with payment of the levy under the Act, with an addition, well-meant but probably unnecessary, that they might and would find means of passing on the burden to the weavers. In any case, these words were outside the requirements of the Police Act. They do not contravene it, though they do not correctly describe what was being done.

As for the rest of this branch of the complaint, the Act does not require proof of the active complicity of a section of the inhabitants before such an order as the Act contemplates can be made. To imply such a requirement would defeat the objects of the Act. It is the essence of measures of this kind, which in one form or another are not uncommon, that one class has to pay for the misdeeds of another, but this in itself constitutes no objection to the course that was taken. There is no issue before their Lordships with regard to the propriety of applying these provisions of the Police Act under the circumstances which had arisen, and they express no opinion about it, but they are not to be taken as suggesting that any question could be raised as to the action of the Government and District Magistrate in itself. Those who are called on to apply such an Act as this have not only the power but the duty of enforcing it when, in their judgment, a case has arisen which calls for its application. They are the best and the only judges in that matter.

Some minor objections were taken, which are either complete misapprehensions or are sufficiently met by S. 79. It will suffice to mention two. In writing to the Commissioner on 7th March, 1922, the District Magistrate had said:

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"To prevent any injustice being done to the Hindus, I would propose that the Deputy Collector in charge of Malegaon Sub-division should hold a summary inquiry at which the Hindu shopkeepers . . . should be called upon to be present, and that, they should be given an opportunity of furnishing proof that, before, during and after the riots, they were actively and publicly on the side of Government. . . When, after this inquiry is finished, these lists of merchants are fixed, the Deputy Collector should estimate approximately the number of saris and the bales of yarn that actually pass through each man's hands . . . The Deputy Collector would make this assessment very much in the way in which income-tax assessments are made. . . . The assessment would be rough and ready, but . . . it would be on very liberal lines."

Subsequently, on 21st April, 1922, the District Magistrate instructed the Sub-divisional Magistrate to take this summary inquiry in hand, adding directions which show that what was further required was an administrative measure to furnish information, on which he himself would proceed to make definitive orders, simultaneous with the expected Government notification. Founding on this, the appellants say that the Hindu shopkeepers ought to have had the opportunity of criticising and refuting the information obtained by the Deputy Collector and that, failing such opportunity, the assessment, which was made on the footing of his report, cannot be enforced against them. This argument overlooks the fact that the first proposed inquiry was to enable the shopkeepers to show that they had at some time been on the side of the Government and of law and order, which at no time have any of them attempted to show; that the inquiries actually made, as to the trade which the different merchants did, appear to have been such as would have been admissible for income-tax purposes; that in any case the District Magistrate's suggestions formed no part of the order made under S. 25-A, or constituted a condition precedent to its validity; and that the Act is silent as to any such inquiry, though, when an inquiry is desired, it is named expressly, and that the implication of such an inquiry—dilatory and often inconclusive as it would be—would tend to defeat the operation of the Act itself. No substantial injustice appears to have been done, for, although the notices issued to individual merchants, dated 25th April, 1922, invited them to show cause against the proposed assessments of the amount of the tax falling severally on them, they do not appear to have adopted this remedy, but preferred to try the effect of this collective suit for an injunction. as a total discomfiture of the Government.

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The other contention is this. When the District Magistrate issued his requirement to the Collector on 12th June, 1922, he named dates for payment of the instalments prescribed, which appear to make the first year for the recoveries begin on 1st January, 1922. In the notice served by the Collector on shopkeepers individually under the same date, the first year of liability is stated as beginning on 1st July, 1921. It is said that this constitutes in form a retrospective imposition of tax, not warranted by the Act, which, in fact, bars the exercise of the contemplated relief by way of passing on the charge to customers, since, in 1922-1923, a shopkeeper could not make deductions or additions from or to his purchases or sales which had been made in 1921. The answer is that the discrepancy as to the date of commencement of the first year is a mere irregularity, and that there is nothing retrospective about the matter. The payment imposed is imposed *de futuro* and the dates are mere elements in a calculation of the amounts and dates of the instalments. As to passing on the burden to the weavers at all, that was purely optional and formed no part of the order.

In one matter, however, not relatively important in itself, their Lordships think that the prescriptions of the Police Act were not observed. In regard to the cost of additional police, the Act provides as follows:—

"25. (4) If the local area, in which any such tax is to be imposed, or any such rate is to be assessed, is a Municipal district, the amount of the charge shall be paid by the Municipality from the Municipal fund, or the rate shall be assessed by the Municipality conformably to the direction given by Government."

"26. (1) Every tax imposed or rate assessed under the last two preceding sections . . . by a Municipality, shall be recovered by such Municipality from each person assessable therefor in the same manner as a municipal tax due by him: Provided always that, in default of such recovery it shall be lawful for the Government to direct the Collector to recover such tax or rate. . . ."

Now on the 1st December, 1921, before the plan of direct collection from the weavers had been given up, the President of the Municipality of Malegaon had reported to the Collector of Nasik on the position as it then was. He recalled that, soon after the disturbances, when it was contemplated that the cost of the additional police should be recovered by the Municipality, he had represented to the Collector that it was totally

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unable to undertake the work in question. He stated that the weavers had become increasingly recalcitrant, that they flatly refused to pay and abused the officials employed. He quoted them as saying openly that the Municipality had no business to undertake the work, when the majority of ratepayers were thoroughly opposed to payment, and he added that even the income-tax payers (only 26 in number) paid nothing but passively awaited the issue of warrants of distress under S. 183 of the District Municipal Act. His report concluded thus:—

"Irregular recovery of Municipal taxes and large outstandings every year are due to the same reason I may add that not a single pie of additional police charges has been recovered up to now. The situation, therefore, is very delicate, and it must be handled with great tact and circumspection. I, therefore, seek your advice as to how I should proceed in the matter. I should also be enlightened on the point, whether the work of executing warrants of distress against income-tax payers should be taken in hand."

The proviso to S. 26 (1) of the Police Act speaks of "in default of recovery" by the Municipality, not "in case of wilful default," and, if the Government read this report under the circumstances as a simple confession of failure so far, there can be no question that the interpretation was justified. The Municipality had never desired to be charged with this recovery: they had sufficient experience of the difficulty of getting any money out of the weavers to desire no more of such responsibilities, and they had come as near as they respectively could to inviting the Government to collect its money for itself. Accordingly, the recovery of the costs of the additional police was placed in the Collector's hands.

It appears, however, to have been overlooked that the object and effect of what was done in June, 1922, was to supersede the old levy by a new one, to be made on different persons and to be measured in a different manner. It was a new exercise of the powers given to the Government by S. 25 (2), to which, therefore, the mandatory provisions of sub-section (4) at once attached. The report made by the President of the Municipality dealt only with the superseded method of recovery, and could not be said to amount to a refusal to try to recover anything, old or new, or to an anticipatory declaration of default under all circumstances. The appellants, accordingly, urge that the Municipality ought to have had the opportunity of making their own assessments, pursuant to S. 25 (4), and of seeing what they could do with a body of

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shopkeepers, men of substance and probably men of peace, who at any rate had a good deal to lose by defying the law, for the chances of success in dealing with them were greater than those attending on a conflict with a numerous body of turbulent workmen, who had little or nothing to lose. They say that the conditions had not been fulfilled, which the Act fixes as precedent to the Collector's right to get in the police rate from them. The point is legally open to them now, little as it can be supposed that they actually desired at the time to have had any demands made by the Municipality on them.

The provision that, when Government decrees integrally a levy for the recovery of the cost of additional police, its execution must be put into and left in the hands of the Municipality, when there is one, until default is made, appears to their Lordships to be more than a form, which might be waived, or a matter, in which irregularity is excused. It cannot be a mere irregularity to disregard an express statutory prescription, however honestly or excusably, nor is a short cut permissible because the prescribed course promises little advantage. The Police Act interposes between the punitive action of the Government and the incidence of the burden on the individual the executive action of a Municipality which may be supposed to feel a responsibility towards its ratepayers and to mitigate, from their point of view, the severity of the chastisement. It has, therefore, a constitutional importance, which must be recognised, whether the practical moment of this arrangement is really considerable or not. On this point only and on this ground alone their Lordships are of opinion that the demand made by the Collector for payments in recovery of the costs of the additional police was premature, and not in accordance with the Act

It, accordingly, becomes necessary to consider the answer which S. 80 of the Code of Civil Procedure affords to the appellants' claim. This answer, if it is applicable at all, applies to the whole suit, but, in view of the numerous and precise attacks, which have been made throughout the proceedings on all the Government officials concerned, and of the differences of opinion which have been expressed in India upon them, it did not seem to their Lordships either right or wise not to examine them, with the object of seeing whether they had any foundation.

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This section and its predecessor, S. 424 of the Code of 1882, have stood for over forty years, substantially in the same form, as a protection to officials in precise terms against personal responsibility for official action. How far-reaching such protection ought to be is a matter of policy; how far it actually extends is a question of judicial construction.

That this suit is one to which S. 80 applies is common ground; the contest is as to its effect when applied. The plaint avers (para. 17) that "Notice, as required under S. 80 of the Civil Procedure Code, has been given to the Collector." This was given on the 26th June, 1922, and the act, purporting to have been done by him in his official capacity which was relied on, was the issue of notices for the recovery from the plaintiffs in the suit of the tax referred to in Notification 152. It does not appear that any notice was served on the Secretary of State, though the section requires it, but no independent ground of defence has been raised on this. The plaint proceeds in the same paragraph "as the suit is for an injunction, and as the defendants are about to recover the amount demanded in the notices soon, the suit is filed before the completion of the period of two months." No particulars were given to show that the Collector intended to enforce the orders before the 15th August, 1922, nor was any satisfactory evidence given to this effect. The plaintiffs appear to have relied simply on the fact that part of the relief claimed in the suit was an injunction.

For many years there has been a marked difference of opinion between the High Court of Bombay, on the one hand, and all the other High Courts in India, on the other, as to the trus application of S. 80 of the Civil Procedure Code (V of 1908) and of S. 424 of the Code (X of 1877), which it superseded, in the case of suits against officials for acts purporting to be done in discharge of their duties, when part or the whole of the relief claimed is a perpetual injunction. After some differences of opinion among their subordinate Courts, the High Courts of Calcutta, Madras and Allahabad have now agreed in deciding that these sections are to be strictly complied with and are applicable to all forms of action and all kinds of relief. [*See* the cases of *Rajlucki Debi* (1) and *Dakshina* (2); of *Kalekhan* (3) and *Koti Reddi* (4);

1 (1897) I L R 25 C 239. 2. (1923) I L R 50 C 992.
3. (1912) I L R 37 M 113 : 23 M L J 181
4. (1918) I L R 41 M 792 : 34 M L J 494.

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of *Bachchu Singh* (5) and *Abdul Rahim* (6).]. In Bombay, on the other hand, in the cases of *Gajanan Krishnarao* (7), *Naginlal* (8) and *Gulam Rosul* (9) which were suits to restrain by injunction the commission of some official act prejudicial to the plaintiff, it has been intimated or held that, if the immediate result of the act would be to inflict irremediable harm, S. 80 does not compel the plaintiff to wait two months before bringing his suit, though, if nothing is to be apprehended beyond what payment of damages would compensate, the rule is otherwise and the section applies.

As the Code of Civil Procedure is applicable to all the High Courts in India, and as S. 80 is intended to afford a protection (whatever exactly it may be), to all officials, high and low, it is certainly undesirable that a difference of opinion such as this should be left unresolved. What appears to have influenced the learned Judges is, firstly, their assumption as to the practical objects with which it was framed [see *Shahebzadee's* case (10); *Peary Mohan Das* (11) and *Raghubans'* cases (12)] and, secondly, is the fact that this protection takes the form of providing for a fixed and obligatory interval of two months between the required notice and the commencement of any suit in respect of the officials' action. It is only right to observe in this connection that, under S. 80 (2) of the Bombay Police Act, at any rate, and it may be under other similar provisions, damages would not be recoverable from a public servant, who gave effect in good faith to orders issued with apparent authority. It appears, therefore, to have been due to anxiety not to expose a plaintiff to the risk of the execution of an invalid order without practical redress, that they adopted a construction, which is not in accord with that accepted generally. The point has been put in this way. S. 80 is but a part of a Procedure Code, passed to provide the regulations and machinery, by means of which the Courts may do justice between the parties. A construction which may lead to injustice is one which ought not to be adopted, since it would be repugnant to the whole tenor and purpose of the Act, and the implication of a suitable exception or qualification is, therefore, justifiable and even necessary. In effect, however, their decisions are not altogether reconcilable with one another, either as to the

5. (1902) I L R 25 A 187.
6. (1924) I L R 46 A 884.
7. (1911) I L R 35 B 362.
8. (1912) I L R 37 B 243.
9. (1916) I L R 40 B 392.
10. (1881) I L R 7 C 499.
11. (1911) 16 C W N 145.
12. I L R 32 C 1130 at 1134.

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extent to which they go, or as to the reasoning on which they are based. Whether the section should be read as if it ran "no suit other than a suit in which an injunction is claimed," or as if it ran "no suit shall be instituted except when serious or irreparable damage might be occasioned to the plaintiff, if not prevented by the previous grant of an injunction," does not appear to have been settled. In the one case all suits falling within the section could safely anticipate the prescribed delay by the simple device of adding a claim for an injunction at the end of the plaint. In the other it would depend on the view, which a Judge might take of the elastic and indefinite expression "serious or irreparable damage," whether the official should have or should lose the benefit of the statutory interval of two months, nor can this difficulty in the least depend on the intention, which may be speculatively attributed to the legislature in prescribing any interval at all. To some extent the Bombay decisions purport to rest on the authority of English cases, of which the principal are:—*Attorney-General* v. *Hackney Local Board* (13) and *Flower* v. *Low Leyton Local Board* (14) These were decided respectively upon the Metropolis Management (Amendment) Act, 1862, and on the Public Health Act, 1875, and turned on the construction then put on the Public Authorities' protection clauses therein contained. The Public Authorities' Protection Act, 1893, has now repealed these clauses, and has adopted another form, to which the authority of *Flower's* case has not been considered applicable [*Harrop* v. *Ossett Corporation* (15), *Fielding* v. *Morley Corporation* (16)]. In the *Hackney* case Bacon, V.C., held that the words "any act done or intended to be done under their Parliamentary powers" could not apply to a nuisance, to which such powers could not in any case extend. The difficulties of this construction are shown in the judgment of Bowen, L. J. in *Chapman, Morsons & Co.* v. *Auckland Union* (17) where he endeavours, but without much confidence, to find a less unsatisfactory basis in the words "writ or process," within which a bill for an injunction might not fall. In *Flower's* case the Court of Appeal held that the Public Health Act. 1875, S. 264, did not extend to a bill in Chancery, but only to an action at law, a consideration inapplicable to S. 80 of the Civil Procedure Code, and

13. (1875) 20 Eq. 626.
14. (1877) 5 Ch. D 347.
15. (1898) 1 Ch. 525.
16. (1899) 1 Ch. 1.
17. (1889) 23 Q.B D 294 at 302.

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assumed that the object of the delay provided by the section was to give time for a tender of amends. It is to be noted that the Public Health Act, 1875, the previous Act of 1848, and the Metropolis Management Act were cases where a subordinate statutory authority had been entrusted with specific and limited powers, and it would seem from *Davies* v. *Corporation of Swansea* (18) that the profession had long taken S. 139 of the Act of 1848 to be applicable only to actions of tort. Similarly in *Flower's* case, counsel hardly contested that an exception of "cases of necessity," as mentioned in the Court below by Malins, V. C., must be understood. A view, therefore, about a bill for an injunction "against serious and irreparable damage requiring the intervention of the Court," almost undisputed in the Court of Appeal, would not be any guide to the meaning of the Civil Procedure Code, where the clause applies to all officers of Government and to all their official acts, and where the words "in respect of," a form going beyond "for anything done or intended to be done," show it to be wider than the statutes, on which the English authorities were decided.

On the other hand, the view which has been taken in the other High Courts may be shortly summarised thus. The argument that a statutory provision as to procedure is subject to some exception of cases, where hardship or even irremediable harm might be caused, if it were strictly applied, might be used with equal cogency in connection with a code fixing the admissibility of evidence or with a limitation section, recognising rights but barring remedies. For this, however, there is no authority. The Act, albeit a Procedure Code, must be read in accordance with the natural meaning of its words. S. 80 is express, explicit and mandatory, and it admits of no implications or exceptions. A suit in which *inter alia* an injunction is prayed is still "a suit" within the words of the section, and to read any qualification into it is an encroachment on the function of legislation. Considering how long these and similar words have been read throughout most of the Courts in India in their literal sense, it is reasonable to suppose that the section has not been found to work injustice, but, if this is not so, it is a matter to be rectified by an amending Act. Their Lordships think that this reasoning is right. To argue, as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while S. 80 is mere procedure, is fallacious, for S. 80 imposes

18. (1853) 22 L J Ex. 299.

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a statutory and unqualified obligation upon the Court. So, too, the contention that the "act purporting to be done by the Collector in his official capacity, in respect of which" the suit was begun, was his threatened enforcement of payment is fallacious also, since the illegality, if any, is in the order for recovery of the tax. If that was valid, there was nothing to be restrained. Hence, though the act to be restrained is something apprehended in the future, the act alone "in respect of which" the suit lies, if at all, is the order already completed and issued.

As for the suggestion that S. 80, in such a case as this is itself *ultra vires*, it arises from a misapprehension of *Moment's* case (19). The regulation for civil procedure has nothing to do with the obligations formerly vesting in the East India Company as a trading corporation, for it is incidental to the duties of the ruling power, and cannot be said to be subject to the Government of India Act, 1858, S. 65.

An attempt was made to distinguish between the effect of S. 80 in the case of the Secretary of State and in the case of the Collector, and to argue that, even if it defeated the action as against the first-named defendant, it would fail to protect the second. Their Lordships cannot accept this. Not only has the suit been throughout a joint proceeding against the officials concerned, for the purpose of getting a joint declaration that the Government Notification was bad as the foundation of everything subsequently done, but, without the presence of the Secretary of State before the Court, the Notification could not be assailed, and, if it stands as valid, the Collector's own action could not be successfully impugned.

The consequence is that the appellants' present position in regard to the taxes imposed on them is as if their action had never been brought. It was unsustainable *in limine*. They commenced their suit before the law allowed them to sue, and can get no relief in it either by declaration or otherwise. Whatever may be the case between other parties, as against the respondents, they must fail. They have taken their own course and have brought this result on themselves. The suit was begun and prosecuted as a joint suit to challenge the official action as soon and as completely as possible. The evidence did not prove risk of serious or irremediable damage to anybody, and was not directed to doing so. The sums payable were in many cases

19. (1912) L R 40 I A 48: 24 M L J 459 (P C).

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very small, and were throughout far from being oppressive. Any sums paid under the Collector's demand would be returnable if that demand was proved to have been bad, and no one of the plaintiffs was shown to have been unable to make the first payment, the only one falling due within the two months. There was no reason for not complying with the words of the section, except over-confidence in what may be called the Bombay view of it. Accordingly, their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellants : *T. L. Wilson & Co.*

Solicitor for respondents : *Solicitor, India Office.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—VISCOUNT DUNEDIN, LORD DARLING AND SIR JOHN WALLIS.

Secretary of State for India in Council ... *Appellant**

v.

Tarak Chandra Sadhukhan and another ... *Respondents.*

[On appeal from the High Court of Judicature at Fort William in Bengal.]

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Land Acquisition Act (I of 1894), S 3 (a)—"Land"—Machinery on land—"Permanently fastened"—Calcutta Improvement Act (Ben. Act V of 1911), S. 70.

In construing S. 3 (a) of the Land Acquisition Act, 1894, the word "permanently" is used as an antithesis to "temporarily".

Decree of the High Court affirmed.

Consolidated appeals from two decrees of the High Court (Chatterjea and Panton, JJ.) affirming awards of the Tribunal constituted under the Calcutta Improvement Act (Ben. Act V of 1911), S. 70.

The respondents were tenants of land taken under the Calcutta Improvement Act and the Land Acquisition Act. On the land so taken was the machinery of an oil-mill plant which had been installed by a previous tenant some 25 years ago. A boiler stood on masonry and was built round with masonry walls almost to the top, and it had flues at the top and sides. The engine was bolted to a masonry foundation, and connected with it was a water heater but not bolted to the foundation. There were 112 ghannies consisting of a revolving mortar on an iron pedestal with a connected pestle; the pedestal was bolted to a

*P. C. Appeal Nos. 35 and 36 of 1926. 3rd March, 1927.

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wooden foundation set in masonry. There was also a forge and lathe. The machinery was capable of removal for repairs, and as regards the boiler, for statutory inspection.

In the award the President of the Tribunal, after setting out the facts, a summary of which is set out above, held that the machinery was "land" within the definition of that term as used in the Land Acquisition Act which is the same as in the Improvement Act by virtue of S. 2 (9).

Leave to appeal to the High Court was granted under S. 3 of the Improvement Act but the appeals were dismissed. A certificate under S. 109, Code of Civil Procedure, was applied for and granted though opposed on the ground that no appeal lay.

The present appeal came on for hearing by the Judicial Committee when the respondents took the preliminary objection that Ss. 1 and 2 of the Land Acquisition Act, 1921, was not applicable. Judgment was reserved but before the same was given the appeal came on upon its merits.

Dunne, K. C. and *Kenworthy Brown* for appellant.—As to whether the machinery was "permanently fastened", the test was as to whether it was intended to make it part of the premises permanently, and not as to the nature of the fastening. The evidence showed that the intention was that the machinery should be removable: *Macleod* v. *Kikabhoy* (1).

De Gruyther, K. C. and *Parikh* for respondents were not called upon.

3rd March, 1927. The Judgment of their Lordships was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN:—This is really a most hopeless case for appeal. Their Lordships do not think it necessary to add anything to what was so very well said by the President of the Improvement Tribunal, who has examined the facts with great accuracy.

As far as the construction of the Act is concerned (and the construction of the Act is the only thing to be determined), their Lordships will only say that it seems to them that the epithet "permanently" is used as an antithesis to "temporarily," and that upon the facts as put by the learned President there can be no doubt that these attachments were anything but temporary and fall absolutely within the word "permanently." In-

1. (1901) I. L. R. 25 B. 659.

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deed, their Lordships can only add that they wonder that such a case was appealed on behalf of the Government.

Their Lordships will therefore humbly advise His Majesty that these appeals be dismissed with costs.

Solicitor for appellant : *Solicitor, India Office.*

Solicitors for respondents: *Downer & Johnson.*

H. C. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER AND MR. JUSTICE MADHAVAN NAIR.

Sengodai Vannan ... *Appellant* (Prisoner)*

Sengodai Vannan, *In re.*

High seas—Offence committed on—Jurisdiction of British Indian Court to try—Penal Code, S. 84—Temporary insanity—Plea of—Proof of —Evidence.

The appellant, a British subject, was convicted, by the Court of Session of the East Tanjore Division, of murder and of causing hurt. The offences were committed on a British ship on his journey from Penang to Negapatam.

Held, following *King-Emperor* v. *The Chief Officer of S. S. "Mushtari,"* (1901) I L R 25 B 636 that the Lower Court had jurisdiction to try the charge.

On a plea of temporary insanity raised with reference to S. 84 of the Penal Code, it appeared that the accused was, at the time of the commission of the offences, suffering from fever, his temperature was only about 100 degrees, and he was not delirious.

Held, that the plea could not be supported

Appeal against the order of the Court of Session of the East Tanjore Division at Negapatam in Case No. 11 of the Calendar for 1926.

G. Ramakrishna Aiyar appearing *amicus curiae.*

The Public Prosecutor on behalf of the Crown.

The Court delivered the following

JUDGMENT :—The appellant has been convicted of murdering two persons and causing hurt to several others. The offences were committed on the B. I. S. N. Co.'s ship "Teesta" on his journey from Penang to Negapatam. The appellant is a British subject and the S. S. "Teesta" is a British ship. A question was raised as to the jurisdiction of the Lower Court to try the charge. A similar question was raised in *King-Emperor* v. *The Chief Officer of S. S. "Mushtari"* (1) where

*Cr Appeal No. 688 of 1926. 3rd March, 1927.

1. (1901) I L R 25 B 636.

Sengodai Vannan, *In re.*

it was held that the Court in British India had, in a similar case, jurisdiction. That jurisdiction is conferred by S. 1 of 12 and 13 Vic. c. 96, which has been made applicable to India by S. 1 of 23 and 24 Vic. c. 88 as well as by S. 686 of the Merchant Shipping Act. Following that decision, we hold that the Lower Court had jurisdiction.

On the merits there can be no doubt that the appellant is guilty of the offences of which he has been convicted. A plea of temporary insanity has been raised with reference to S. 84 of the Indian Penal Code. The one thing that is clear is that, at the time, the appellant was suffering from fever, but his temperature was only about 100 degrees and it has not been proved that he was delirious. We cannot therefore accept this plea. At the same time it is possible that the appellant's acts were due to an attack of homicidal mania, though, as remarked in *Queen-Empress* v. *Venkatasami* (2), we cannot say that the evidence warrants a finding that they were. We must confirm the conviction and sentence, but direct that the evidence and this judgment be brought to the notice of His Excellency the Governor in Council in order that he may, if he thinks fit, reduce the sentence.

A. S. V. *Sentence confirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Rama Naidu ... *Petitioner** (*Complainant*)

v.

Veerapuram Venkatasami Naidu *alias* Chinna Naidu ... ... *Respondent* (*Accused*).

Rama Naidu *v.* Venkatasami Naidu.

Criminal Procedure Code, S. 203—If applies to proceedings of a Village Magistrate—Autrefois acquit—*Principle of—Applicability.*

S. 203 of the Criminal Procedure Code has no application to the proceedings of a Village Magistrate and consequently the dismissal of a complaint by a Village Munsif is no bar to a Magistrate entertaining the same complaint.

Quaere: Whether the principle of *autrefois acquit* applies to such a case.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order dated 16th September, 1926 of the Court of the Second Class Magistrate of Trivellore in C. C. No. 339 of 1926.

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*Cr. R. C. No. 792 of 1926. 9th February 1927.
(Cr. R. P. No. 668 of 1926.)

2. (1889) I L R 12 M 459.

Rama Naidu v. Venkatasam Naidu.

H. Suryanarayana for petitioner.

The Public Prosecutor on behalf of the Crown.

C. Narasimhachariar for respondent.

The Court made the following

ORDER :—This is an application to revise an order of discharge passed by the Second Class Magistrate, Trivellore. The petitioner preferred to him a complaint of offences under Ss. 447 and 323, I. P. C. The case was taken up under S. 323 only and process issued. The accused then put forward a petition that a complaint on the same facts had been put in by the petitioner to his local Village Magistrate and that the Village Magistrate had dismissed it for default of appearance. Accused contended that that dismissal barred the jurisdiction of the Sub-Magistrate to entertain the complaint. The Sub-Magistrate holding that the dismissal of the complaint by the Village Munsif amounted to a dismissal of a complaint under S. 203, Criminal Procedure Code, held that it was not open to him to proceed with the case so long as the dismissal remained in force, and he therefore discharged the accused. The petitioner comes up in revision.

Now the Magistrate is obviously wrong in holding that S. 203, Criminal Procedure Code, has any application to the proceedings of a Village Magistrate. The Code itself, except in a very few specific instances, does not apply to Village Magistrates. Therefore the dismissal of the complaint by the Village Munsif is not, so far as the Criminal Procedure Code lays down, any bar to the Magistrate proceeding with the case.

It is argued, however, by the accused that the principle of *autrefois acquit* will apply generally, apart from the Criminal Procedure Code. To apply such a principle to this case involves two propositions, first, that the dismissal by a Village Munsif of a complaint for default of appearance tantamounts to an acquittal; and second, that the acquittal by a Village Court, which is not a recognised tribunal under the Criminal Codes, will attract the application of the general principle. Neither of these propositions is self-evident, and I am not prepared to accept them without further consideration. It does not seem to me however necessary to settle this point in the present case. Instead of coming up here to have the Village Magistrate's order set aside, the petitioner has chosen to come up here to have the Sub-Magistrate's order set aside. He has not chosen the easier remedy but the more difficult and complex one. The case is after all a very petty one which the petitioner chose in

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the first instance to have decided by the Village Magistrate. I am not prepared to pass in his favour an order which will have the effect of bringing the case into a forum where the petitioner did not in the first instance desire it to be tried. I therefore decline to interfere and dismiss this petition.

N. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Chingi Chinnappa Naidu (dead) and others ... *Appellants** (*Deft.'s* L R)

v.

Maniam Raju Goundan and others ... *Respondents in all (Plaintiffs and 3rd Plaintiff's L. R.).*

Chinnappa Naidu v. Raju Goundan.

Board's Standing Order No 18—*Alteration of, in* 1906—*Tree pattas —Cancellation of and inclusion of trees in land pattas—Intention and effect—Tree pattadar's right to trees—Tree pattadar and land pattadar same—Two different rights in case of—Distinction.*

Even if tree pattas are cancelled and are included in the land pattas, that does not amount to a resumption of the possession of the trees from the tree pattadars or to a re-grant of the trees to the land pattadars. The Government could not, by merely altering the Standing Order No. 18 and by refusing to issue fresh tree pattas and by including the trees in the land pattas, put an end to the rights over the trees of the tree pattadars; nor was this intended by Government by the said Standing Order. Only where it is feasible, *i.e.*, where the land pattadar and tree pattadar happens to be the same, the new policy was intended to be carried out. Where the two are different persons, the trees were intended to be left in the possession of the tree pattadar, and the land pattadar, in whose patta they are to be included, while becoming liable to pay the assessment on them to the Government, must make the collection of the assessment in his turn from the tree pattadar.

Second Appeals against the decrees of the District Court of North Arcot at Vellore in Appeal Suits Nos. 164, 192, 193, 194, 195, 196, 197 and 198 of 1921, preferred against the decrees of the Court of the District Munsif of Tiruppattur in Original Suits Nos. 546, 547, 569, 570, 571, 549, 572 and 548 of 1919 respectively.

S. G. Rangaramanujam for appellants.

M. Patanjali Sastri and *A. Sundaram Aiyar* for respondents.

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*S. A. Nos. 583 to 590 of 1923. 3rd January, 1927.

Chinnappa Naidu v. Raja Goundan.

The Court delivered the following

JUDGMENT:—In dealing with this batch of Second Appeals it will be convenient to set forth the facts. These suits relate to the ryotwari village of Muttlam in the North Arcot District. From time immemorial the ryotwari holdings were being held by the ryots excluding the trees, all the trees in the village being held under a separate tree patta by a tree pattadar. In the year 1906 the Government have changed the policy of having separate land pattas and separate tree pattas, and the Board's Standing Order No. 18 was altered as follows:—

"*Trees on occupied lands.*—Subject to the exception noted below, no claim should ordinarily be made on behalf of the Government to any rights over trees growing on land held on ryotwari patta, or as inam, or as village or town house-site. Separate pattas should not be issued for the trees, and where such pattas now exist the tree patta should be cancelled and the tree pattadar left to make his own arrangements with the land pattadar, if the two are different persons."

"*Exception.*—When conditions have been expressly inserted in the patta limiting the pattadar's rights over the trees or when land has been assigned on special patta, cowle or lease with such limiting conditions, those conditions should be strictly enforced."

Reading the new rule and exception it is clear that the policy of the Government is to dispense with tree pattas and include the trees in the land pattas wherever practicable, but where not practicable the old system would continue. The exception shows this. The suit village was re-settled in Fasli 1323. In the Settlement Register of this new settlement, which is Exhibit O (page 3), the following statement occurs:

"Except in the case of trees standing on land registered as 'poramboke' tree pattas have been cancelled at re-settlement *wherever practicable* and the tree tax replaced by land assessment. The following poramboke revision survey fields contain topes which are held on original tree patta:"

Then follows a table of survey numbers which are all admitted to be poramboke lands and the tree assessment is shown as Rs. 119-12-7. The present suits are brought by the tree pattadars for a declaration of their rights to the enjoyment of the trees on the lands included in the land pattas and therefore not 'poramboke' and for mesne profits and damages. The claim for mesne profits and damages was not pressed in the Lower Appellate Court and need not be pursued further. The only question that has to be discussed here is the right to the trees.

The District Munsif on a consideration of the fact that there is some difference between the old assessment and the

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new assessment on the lands, that there is some addition to the old assessment in arriving at the new assessment on the land and also of the fact that there is some reduction of the assessment in the tree patta from Rs. 133 to Rs. 119-12-7, inferred that all the trees must have been resumed from the tree pattadars, *i.e.*, the plaintiffs, and must have been included in the land pattas. Incidentally it may be observed that only some land pattadars denied the plaintiffs' right to the trees and these suits are filed only in respect of such pattadars. There are other lands in the village containing trees in respect of which no suits have been filed. The District Munsif also held that the decision in *Sengoda Goundan* v. *Varadappan* (1) does not apply to the facts of this case. He therefore dismissed the plaintiffs' suits.

The plaintiffs, who are the same in all the suits, appealed. The District Judge did not apply his mind to the events that happened at the time of the settlement, *i. e.*, he did not consider the question whether the trees in the patta lands were included in the land pattas and were excluded from the tree pattas. He addressed himself solely to the question as to the proper construction of the decision in *Sengoda Goundan* v. *Varadappan* (1). He held that, even if the tree pattas are cancelled and are included in the land pattas, that does not amount to a resumption of the possession of the trees from the tree pattadar or to a re-grant of the trees to the land pattadar. On this ground he reversed the District Munsif's decision and decreed the plaintiffs' suits declaring their right to the trees. The defendants filed these Second Appeals.

In these Second Appeals I am inclined to agree with the view of the District Judge on the proper construction of the decision in *Sengoda Goundan* v. *Varadappan* (1), *i. e.*, I do not think that Government can, by merely altering the Standing Order and by refusing to issue fresh tree pattas and by including the trees in the land pattas, put an end to the rights over the trees of the tree pattadars; nor do I think this is what was intended by Government by the Standing Order. Only where it is feasible, *i. e.*, where the land pattadar and tree pattadar happens to be the same, the new policy was intended to be carried out and not that the trees should be forcibly taken up from the tree pattadar and granted to the land pattadar. Again the last sentence in the Standing Order. "The

1. (1911) I L R 36 M 148 : 22 M L J 201.

tree pattadar is left to make his own arrangements with the land pattadar, if the two are different persons" shows that the trees were intended to be left in the possession of the tree pattadar and that the land pattadar in whose patta they are to be included, while becoming liable to pay the assessment on them to Government, will make the collection of the assessment in his turn from the tree pattadar. This is what is meant by saying that he must make his own arrangement with the land pattadar. So that, if in the case of this village the facts are that the trees were excluded from the tree pattas of the plaintiffs and were included in the land pattas of the defendants, the proper result would be that, while the plaintiffs are entitled to the possession of the trees, they would be liable to pay the assessment on them to the defendants who in their turn will pay to the Government. Thus it is clear that a mere construction of the decision in *Sengoda Goundan* v. *Varadappan* (1) is not enough in this case, as was properly pointed out by Mr. Patanjali Sastri, the learned Vakil for the respondents to settle the rights between the parties. It is still necessary to find whether the trees were included in the land pattas of the defendants and were excluded from the tree pattas as was found by the District Munsif. As the District Judge has not addressed himself to this question and has given no finding on this matter and as I have gone fully into the case I can give a finding here and will now proceed to do so.

The District Munsif was influenced by the consideration that the assessment on the lands of the defendants was increased in the new settlement and that the assessment on the tree patta was reduced. Taking the first consideration I find that not only in respect of the lands with trees on them but in respect of lands without trees and as to which there has never been any question of separate tree patta the assessment has been different from that in 1884. A comparison of Exhibit D, the settlement register of 1884 and Exhibit O, the settlement register of 1915 shows this. It is obvious that the assessment on the village has been enhanced in pursuance of the Government's right to do so at periodical settlement. Then again the District Munsif referred to the other consideration, namely, that there is reduction in the assessment of the tree patta, the old assessment was Rs. 133 and the new assessment Rs. 119-12-7. He therefore comes to the conclu-

1. (1911) I L R 36 M 148 : 22 M L J 201.

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sion that this reduction is due to the exclusion of the trees on the patta lands from the tree patta, Rs. 119 now representing the assessment only on the trees on the poramboke lands. Ex. C is an account prepared by the Revenue Officers and is described as No. 2-C account. It gives the number of trees on all the lands in the village including the patta lands and the poramboke lands and it shows that the total number of the trees is 7,435 and column 11 says:

"Assessment paid to Government is Rs. 119-12-7"

and, in column No. 12, it says:

"They are paying the assessment mentioned in column No. II and are enjoying the same as bilmuktha patta."

Ex. C clearly shows that the tree pattadars are enjoying all the 7,435 trees on payment of the assessment of Rs.119-12-7 and the reference in paragraph 13 of the Descriptive Memoir to Rs. 119-12-7 as the tree assessment simply means that the assessment of the trees on the poramboke lands was included in Rs.119-12-7 and not that it actually amounts to Rs.119-12-7. This is obvious from another consideration if one looks at the number of trees. The number of trees on the poramboke lands which consist of S. Nos. 3, 7, etc., given at the end of Ex. C is 159 trees and the number of trees on the rest of the lands is 7,276. If Rs. 133 was the assessment on all the trees in the village, namely, 7,435, it is absurd to imagine that Rs. 119-12-7 is the assessment on the trees in the poramboke lands which are 159 in number. The inference is obvious that the reduction of Rs. 133 to Rs. 119 is not due to the exclusion of the trees on the patta lands but to some other cause. The learned vakil for the respondents explains that four of the lands on which there were trees, which are not formerly granted on patta to anybody, have now been given to the tree pattadar, and as in this case the tree pattadar and the land pattadar happens to be the same there is no difficulty in carrying out the policy of the Board's Standing Order. The trees on these lands were therefore included in the land pattas and were excluded from the tree pattas and the reduction of Rs. 133 to Rs. 119 is due to this. The District Munsif seems to have dealt with an argument of this kind in paragraph 13 of his judgment; but it seems to me he has not grasped it completely. The number of the new patta granted to the tree pattadars is given as No. 23. The District Munsif then complains that it has been withheld and has not been produced. The learned vakil for the respondents has offered to produce it here before me, but I found it unneces-

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sary to take it and I will not base my judgment on that paper. On an examination of the Settlement Register, pages 2, 26, 34 and 36, it appears that four items of lands, namely, Nos. 3|3,154, 193 and 203 were lands granted under Patta No. 23 and the grantees are Munisawmi Nattan, who is the predecessor-in-title of the 2nd plaintiff, Raju Goundan, the 1st plaintiff and Venkatrama Aiyangar, the predecessor-in-title of the 3rd plaintiff. Thus the explanation of the respondents' vakil seems to be well founded and the sentence in paragraph 13 of the Descriptive Memoir, namely, "Tree pattas have been cancelled at re-settlement wherever practicable" seems to apply only to the trees on these four lands. These trees are now excluded from the tree patta and included in the land pattas. But so far as all the other trees in the village are concerned, that is, those on the patta lands other than these four items and those on the poramboke lands, they are still included in the tree patta, because it is not practicable to exclude them, and the new assessment of Rs. 119 for the trees includes all these trees and therefore the trees on the suit lands. It does not matter whether a separate tree patta has been issued or not. Ex. C shows that some trees in the village are being held on an assessment of Rs. 119-12-7. The only question is where are those trees, are they only the trees on poramboke lands, or do they include the trees on patta lands other than the lands? I think they include the trees on the patta lands other than the four lands. In this view no question arises as to the construction of *Sengoda Goundan* v. *Varadappan* (1). The decree granted to the plaintiffs in the Lower Appellate Court is right. The second appeals are dismissed with costs.

A. S. V. *Appeals dismissed.*

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1. (1911) I L R 36 M 148 : 22 M L J 201.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

Subramania Aiyar *alias* Gurumurthi Aiyar ... ... *Petitioner in both the Petns.* (*Respt.-Plff.*)

v.

Varadarajulu Naidu and others .. *Respondents in all —Petns.* (*4th & 5th Defts.*)

Subramania Aiyar v. Varadarajulu Naidu.

Civil Procedure Code (1908), *O.* 9, *R.* 13—Ex parte *decree—Application to set aside—Jurisdiction to entertain—Appeal against that decree—Dismissal of—Effect—Order setting aside* ex parte *decree—Revision—Interference in—Grounds.*

The Court which passed an *ex parte* decree has jurisdiction to entertain an application to set aside that decree even after an appeal therefrom has been dismissed.

An order setting aside an *ex parte* decree on an application made for that purpose cannot be set aside in revision in a case in which there was evidence which, if believed, would justify a Court in holding that the applicant had sufficient grounds for not appearing.

An order setting aside an *ex parte* decree will be set aside in revision if it is not based on any ground recognised by law.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order dated 26th March, 1925 of the Court of the Subordinate Judge of Dindigul in C. M. A. Nos. 24 and 32 of 1924 preferred against the order of the District Munsif of Dindigul in I. A. Nos. 869 and 40 of 1924 in O. S. No. 14 of 1921.

K. S. Jayarama Aiyar, P. N. Appusami Aiyar and *S. Nagaraja Aiyar* for petitioner.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff sued defendants 1 to 3 in ejectment, and the 4th and 5th defendants were subsequently impleaded as successive purchasers of the 3rd defendant's rights. On 27th November, 1923, an *ex parte* decree was passed against all the defendants. I will deal first with the case of the 5th defendant which is the subject of the C. R. P. No. 357. He applied to the trial Court to have the *ex parte* decree set aside and he also filed an appeal against the decree. The appeal was dismissed on 8th April, 1924, and later on 6th August, 1924

*C R P Nos. 357 and 977 of 1925. 19th January, 1927.

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the District Munsif took up the application to set aside the *ex parte* decree and dismissed it. There was an appeal against this decision and the Subordinate Judge reversed it and directed that the suit should be restored to file. The broad question now raised is one of jurisdiction—whether the District Munsif was competent to entertain the application to set aside the *ex parte* decree after an appeal from that decree had been dismissed. Admittedly the point was not raised before the District Munsif when he passed his order, but I agree with the petitioner that, as a pure question of law, it may be taken here.

It was formerly the view of this Court that, as soon as an appeal was filed, and even before it had been disposed of "the further litigation and all matters connected with it are transferred to and placed under the control of the appellate Court". This was the doctrine adopted in *Ramanadhan Chetty* v. *Narayanan Chetti* (1), where the proceeding under consideration was one of review, and it was re-affirmed in *Sankara Bhatta* v. *Subraya Bhatta* (2) where, as here, the power of the Lower Court to set aside an *ex parte* decree was in question. Subsequently, the question was raised and referred to a Full Bench *Chenna Reddi* v. *Peddaobi Reddi* (3) whether *Ramanadhan Chetty* v. *Narayanan Chetti* (1) was rightly decided, and it was held that it was not, that where an application for review is presented by a party and an appeal is afterwards preferred, the Court to which the application for review was made was not thereby deprived of jurisdiction to entertain the application. Wallis, J., (as he then was) was a party both to this case and to *Sankara Bhatta* v. *Subraya Bhatta* (2) and, in delivering the leading judgment of the Full Bench, distinguished the latter case on the ground that "no question arose or was considered in that case as to the present point." I take the learned Judge's meaning to have been that while the fact that an appeal had been preferred would not preclude entertainment of an application for review, it does not follow that it would not preclude entertainment of an application to set aside an *ex parte* decree. I confess that I have not myself been able to discover any reason why the broad principle formulated in *Ramanadhan Chetty* v. *Narayanan Chetti* (1) and rejected by the Full Bench in the case of a review, should hold good in

1. (1904) I L R 27 M 602 : 14 M L J 321.
2. (1907) I L R 30 M 535 : 17 M L J 436.
3. (1909) I L R 32 M 416 : 19 M L J 388 (F B).

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the case of an order setting aside a decree passed *ex parte*. Indeed the language of O. 9, R. 13 of the C. P. C. which enables a defendant to "*apply to the Court by which the decree was passed* for an order to set it aside", would seem to reserve that power even after an appellate decree has been passed. The learned Judges who decided *Sadaya Konan* v. *Annamalai Udayan* (4) were impressed by this consideration, and observed that if the matter were *res integra* they would have had considerable hesitation in holding that an appellate Court had power to set aside an *ex parte* decree but they followed *Sankara Bhatta* v. *Subraya Bhatta* (2) and decided the question in the affirmative. They add that the learned Judges who decided the Full Bench case were of opinion that *Sankara Bhatta* v. *Subraya Bhatta* (2) was good law, but I have not myself been able to extract from the Full Bench judgment an expression of this opinion. Had the matter rested there, I should have seen myself clear to follow the principle that the existence of an appellate decree divested the trial Court of power to set aside its own decree passed *ex parte*, a principle which appears to be in consonance with the theory lucidly formulated by Bhashyam Iyengar, J., in *Kristnama Chariar* v. *Mangammal* (5), that there cannot be two final decrees in a suit, one by the Court of first instance and the other by the Court of Appeal, but that the appellate decree supersedes the original decree and is the sole final decree. But the question arose again in *Palaniappa Chetty* v. *Subramania Chetty* (6) and it was held by Ramesam, J., and Oldfield, J., concurring, that even where a defendant has been a party to an appeal which has been disposed of, an application by him to set aside an *ex parte* decree does not lie in the appellate Court, but ought to be filed in the first Court. I cannot accede to the contention either that the view expressed in this case was *obiter* or that no definite opinion was expressed at all. The decision affords a direct authority against the position which the petitioner here contends for, since it can make no difference whether the party making the application was appellant or respondent in the appeal and sitting singly in revision I feel myself bound to follow it. In these circumstances no useful purpose will be served by discussing the conflicting case-law arising from decisions by other High Courts.

2. (1907) I L R 30 M 535 : 17 M L J 436. 4. (1915) 2 L W 529.
5. (1902) I L R 26 M 91 (F B) 6. (1921) 42 M L J 12.

The respondent has raised a further question which, however, on the view I have adopted, does not arise. The learned Subordinate Judge who disposed of the appeal dismissed it on the ground, admittedly an erroneous ground, that no appeal lay. This decision was embodied in a decree dismissing the appeal and directing each party to bear his own costs; but, notwithstanding the existence of his decree, it is not easy to see how an appellate Court which conceived itself unable to interfere with an original decree in appeal can be taken in fact to have passed a decree superseding it. On this ground also, which I do not think necessary to discuss more elaborately, the District Munsif would not have been deprived of the power to entertain the application.

I have been taken into the merits of the Subordinate Judge's order reversing that of the District Munsif, and directing that the suit be restored. The plea advanced by the 5th defendant was one of illness. The District Munsif has given what appear to me to be very good reasons for suspecting the truth of the plea, and the Subordinate Judge has given very poor reasons for accepting it. But that circumstance would not justify me in reversing his order, and I cannot agree that there was not evidence which, if believed, would not justify a Court in holding that this defendant had sufficient grounds for not appearing.

Turning to C. R. P. No. 977 of 1925, the same question of jurisdiction is raised, and I must decide it in the same way. The excuse which the 4th defendant gave for his absence was that he had a wound upon his knee attended by swelling and fever but that was not the reason accepted by the appellate Court. The learned Subordinate Judge found that this defendant left the conduct of the case to the 5th defendant, and that, except for this reason, he had nothing else to justify his absence. Apparently the Court did not accept the excuse, because, after referring to it, the judgment continues "but considering that the application of the 5th defendant for setting aside the *ex parte* decree has been allowed and there seems to be a common ground for all these contesting defendants, the application of this defendant also has to be allowed." It would seem that in making this observation, the Subordinate Judge had in mind the proviso to O. 9, R. 13, C P C., viz., "Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also".

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But the learned vakil who appears for this respondent has not sought to show me that the decree in this case is of such a nature, so that I conclude, he does not feel that he can rely upon this provision. The Subordinate Judge himself as will be seen from the passage I have quoted does not record any finding as to the indivisible nature of the decree; so that, in setting it aside as against the 4th defendant, he acted upon no ground recognised by law, and his order cannot be upheld.

The result accordingly is that C. R. P. No. 357 of 1925 is dismissed with costs. C. R. P. No. 977 of 1925 is allowed and the decree of the Subordinate Judge of Dindigul in C. M. A. No. 32 of 1924 is set aside and the order of the District Munsif of Dindigul in I. A. No. 40 of 1924 restored. Respondent in this C. R. P. will pay petitioner's costs throughout.

A. S. V. *C. R. P. No.* 357 *dismissed*
C. R. P. No. 977 *allowed*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT :—VISCOUNT HALDANE, LORD SHAW AND LORD WARRINGTON OF CLYFFE.

Sasti Kinkar Banerjee ... *Appellant** (*Insolvent-debtor*)

v.

Hursookdas Chogemull ... *Respondent* (*Petitioning-creditor*).

P. C.

Sasti Kinkar Banerjee v. Hursookdas Chogemull.

Presidency-towns Insolvency Act (*III of* 1909), *S.* 22—*Stay of proceedings—Discretion of Court—Non-interference on appeal.*

Whether or not the Court shall exercise the power given to it by S. 22, Presidency-towns Insolvency Act, 1909, of staying the proceedings is entirely one of discretion.

Where this discretion has been judicially exercised by the primary Court, it will not readily be interfered with by a Court of Appeal.

Appeal (No. 73 of 1926) from the High Court of Calcutta.

The facts of the case sufficiently appear from the judgment of the Judicial Committee.

Parikh for appellant.

Kenworthy Brown for respondent.

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*P. C. Appeal No. 73 of 1926. 5th May, 1927.

P. C.

Satti Kinkar Banerjee v. Hursookdas Chogomull.

Viscount Haldane.

5th May, 1927. The Judgment of their Lordships was delivered by

VISCOUNT HALDANE.—In this case the only real question is whether the High Court had jurisdiction to make the order that was made at Calcutta, adjudicating the appellant insolvent. The history of the case is that on the 6th August, 1924, the appellant was adjudicated insolvent by the Court of the District Judge of Birbhum. Then on the 15th September the respondent firm filed a petition in the High Court of Calcutta on the Original Side in Insolvency Jurisdiction, making a claim to money, and that was supported by an affidavit. Some controversy was at first raised by the appellant on this matter, and it was alleged that the High Court had no jurisdiction. On the 17th March, 1925, the High Court in its Insolvency Jurisdiction treated itself as having jurisdiction and made an order adjudicating the appellant insolvent. Then there was an appeal to the High Court and the High Court agreed with the learned Judge, who decided for insolvency, and held that he was acting under his jurisdiction in accepting, upon the petition which was verified by affidavit, that the acts of insolvency against the debtor had been established and that the Court was not hampered by the proceedings in the other Court. Then leave to appeal was given and the appellant comes here.

What the appellant says is this. He does not dispute the jurisdiction which arises under the Insolvency (Presidency Towns) Act, 1909, but he says that, having regard to S. 22 of that Act, it was wrong to make the order that was made at Calcutta. S. 22 is in these terms:

"Where it is proved to the satisfaction of the Court that insolvency proceedings are pending in any other British Court within or without British India against the same debtor and that the property of the debtor can be more conveniently distributed by such other Court, the Court may annul the adjudication or may stay all proceedings thereon."

Their Lordships think that makes it quite clear that the High Court in Calcutta had power to stop these proceedings and to say it is more convenient that matters should go on at Birbhum; but there seems to have been some suspicion that the proceedings at Birbhum were not proceedings which were in the best interest of the creditors and that it was better that the jurisdiction should be exercised by the High Court, and accordingly the High Court Judge exercised his jurisdiction, and, on appeal to the Court of Appeal, the view taken by Mr. Justice Buckland in so deciding the case was affirmed.

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The judgment of the Court of Appeal, so far as it is material to refer to it, said this:

"From the minutes it appears that it was not contended that the Court had no jurisdiction to make the order prayed for, and it also appears from the minutes that the matter that was argued was that inasmuch as there had been an adjudication in Birbhum this Court should not make a further adjudication order in Calcutta. From the minutes it also appears that the learned Judge held that the adjudication order in Birbhum did not interfere with his jurisdiction to make the adjudication order in this Court, and he stated that it was open to any party to make such an application as he might be advised to make under the provisions of section 22 of the Presidency Insolvency Act"—which is the section quoted above—"for a stay of proceedings."

Then the judgment of the Court of Appeal goes on to say that counsel who conducted the case in the lower Court on behalf of the insolvent, on being asked by them the question, expressly stated that he did not desire to raise the contention urged in the affidavit with regard to the jurisdiction of the Court to deal with the matter, having regard to the place of residence and business of the debtor, thus clearly showing that the debtor was treated as being within the ambit of the insolvency jurisdiction of the Calcutta Court.

The whole point, therefore, became this: There being this order in the first Court, there should not be a further order in the other Court; but the Court of Appeal is of opinion that in the circumstances

"the learned Judge had authority in his discretion, notwithstanding the previous adjudication in Birbhum, to make an adjudication here, and that he exercised a discretion in making such an order, which is not a discretion which should be interfered with by a Court of Appeal. After all, as the learned Judge has pointed out, it was open to any party who so desired, notwithstanding the fact that an adjudication order had been made, on proper materials to satisfy the Court that the proceedings in Calcutta should be stayed, having regard to the insolvency proceedings that were going on in the Court at Birbhum. The result is that there is no substance in this appeal or in the argument by which it is sought to support the appeal."

Their Lordships take the same view as the Court of Appeal. They think that, for the reasons given by the learned Judges there, and having regard to the language of S. 22, there is no substance in the point that is now made. The Court had a discretion, it had jurisdiction, but might have had, at a subsequent stage, to restrain the exercise of that jurisdiction in any way which the circumstances required. The circumstances, in the opinion of the Court below, did not require that the jurisdiction should be restrained, and their Lordships can well under-

stand that the Court below was justified in its refusal. In any event, their Lordships do not propose to interfere with the discretion so exercised.

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Sasti Kinkar Banerjee v. Hurrookdas Chogemull.

Viscount Haldane.

The result is that the appeal fails, and must be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Chapman, Walker* and *Shephard.*

Solicitors for respondent: *Oswald, Hickson, Collier & Co.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT :—LORD PHILLIMORE, LORD DARLING, MR. AMEER ALI AND SIR LANCELOT SANDERSON.

Basiram Saha Roy and others ... *Appellants**

v.

Ram Ratan Roy and others ... *Respondents.*

P. C.

Basiram Saha Roy v. Ram Ratan Roy.

Joint estate—Partition—Finding that estate not previously partitioned binding on the High Court in Second Appeal—Putni specifically naming villages—Code of Civil Procedure (*V of* 1908), *Ss.* 100, 101—*Estates Partition Act* (*Ben Act V of* 1897), *S.* 99.

Where in first appeal there is a finding that an estate was held in common tenancy such finding is binding in law on the High Court in second appeal under Ss. 100 and 101, Civil Procedure Code.

The Estates Partition Act, 1897, does not contemplate that there is some *tertium quid* between common tenancy and several holding, so that a formal partition does not affect or interfere with the arrangements under which landowners, who are in some respects still tenants in common, may yet have specific shares allotted to their exclusive use.

Grants of a share in specified mauzas, which are portions of an estate held in common tenancy come under S. 99 of the Act. Where a putni lease is in respect of specified mauzas, but the lessor's enjoyment is by convention only and subject to revocation, a similar principle applies.

Nagendra Mohan Roy v. *Pyari Mohan Saha,* (1915) I L R 43 Cal. 103 distinguished.

Joy Sankari Gupta v. *Bharat Chandra Bardhan,* (1899) I L R 26 Cal. 434 approved.

Decree of the High Court reversed.

Consolidated appeal from three decrees of the High Court reversing three decrees of the Additional District Judge of Faridpur and reversing three decrees of the Subordinate Judge of Faridpur.

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*P. C. Appeal No. 55 of 1925. 4th March, 1927.

P. C.

Basiram Saha Roy v. Ram Ratan Roy.

The facts appear in the judgment reported below.

Sir George Lowndes, K. C. and *E. B. Raikes* for appellants.

H. N. Sen for respondents.

4th March, 1927. The Judgment of their Lordships was delivered by

Lord Phillimore

LORD PHILLIMORE :—On the 9th April, 1868, the principal respondents gave putnis or perpetual leases of certain properties to the present appellants or to persons from whom the present appellants derive title.

The material part of one of the putnis is expressed in the following terms:—

"The zamindari No. 2049 of the aforesaid pargana, standing in the names of the Chowdhuries, and held in our ownership, is recorded in the Collectorate of district Backergunj at a sudder jumma of Rs. 1,280-15-6¼ pies. A 12 gundas 1 kara 13 tils 1¼ krant share out of the 1 anna 11 gundas 2 karas of the 1 anna 14 gundas hissya of Raghu Nath Chowdhury appertaining to the 8 annas 10 gundas hissya of the aforesaid zamindari, that is, a 6 annas 5 gundas share out of the aforesaid 1 anna 11¼ gundas hissya taken as 16 annas, belongs to us, and of which we are in enjoyment and possession on payment of the sudder rent. As we are unable to till, cultivate and settle the lands appertaining to the aforesaid hissya, we, of our own accord, grant you in writing a putni talukdari pottah of mauzas Chhoto Dumaria, Gopalpur, Narayankhana, Dharabashail, Kandi, Suagram, Shalukha, Chhatian, Patiljhapa, Bahirshamli, Korya, Rarirbilla, Ghagharkhanda, except the debottar, and the kismats appertaining thereto, at the annual rent of Rs. 145."

The other putni is in similar terms.

The zamindari in question is of a very great extent, and, as appears from the passage in the putni lease which has just been quoted, the ownership of it has broken up into various divisions and sub-divisions. There are said to have been 300 proprietors.

In 1897 a purchaser from one of these sharers applied under Ben. Act V of 1897 for a partition. This application was resisted by some of the other proprietors; but the Collector granted it, and in process of time a regular partition was effected, and the property was divided into 28 different estates.

As a result of this partition, the mauzas allotted to the respondents were not those mentioned in either of the putni leases of 1868.

Thereupon the appellants, relying upon S. 99 of the Estates Partition Act, claimed that their putni leases should be held good as regards the lands allotted under the partition to the respondents, and this claim being resisted, they brought three

suits, which have now been consolidated, for possession and mesne profits.

The Subordinate Judge dismissed the suit. On appeal the District Judge reversed that decision, worked out the extent to which the appellants would be entitled to compensation lands, and gave appellants a decree for possession of them with mesne profits and a proportion of the costs.

It should be stated that, in the view of the District Judge, accurate calculation would have given to the appellants a somewhat larger share, but that they were content to accept the decree in the form prepared by the District Judge in order thereby to avoid intricate calculations.

This judgment of the District Judge was, however, reversed on appeal by the High Court, which dismissed the suit. Hence the present appeal.

In order that the decisions in this case may be rightly appreciated, it is desirable to set out the material part of sections 4 and 7 and the whole of S. 90 of the Estates Partition Act.

"Section 4.—(1) Subject to the provisions of this Act, every recorded proprietor of a joint undivided estate who is in actual possession of the interest in respect of which he is so recorded shall be entitled to claim a partition of the said estate and the separation therefrom and assignment to him as a separate estate of land representing the interest of which he is in such possession."

"Section 7.—(1) Where the lands of an estate have been divided by private arrangement formally made and agreed to by all the proprietors, and each proprietor has, in pursuance of such arrangement, taken possession of separate lands to be held in severalty as representing his interest in the estate, no partition of the estate shall be made under this Act except—

(a) on the joint application of all the proprietors; or

(b) in pursuance of a decree or order of a Civil Court."

"Section 99.—If any proprietor of an estate held in common tenancy and brought under partition in accordance with this Act has given his share or a portion thereof in putni or other tenure or on lease, or has created any other encumbrance thereon, such tenure, lease or encumbrance shall hold good as regards the lands finally allotted to the share of such proprietor, and only as to such lands."

In the view of the Subordinate Judge the parent estate was, previous to the formal partition of 1897, already enjoyed by its co-owners in severalty under a private partition. He also thought that the appellants had not really been dispossessed of their former putni lands, and that the suits were not brought *bona fide*, but in order to get more convenient lands in substitution for those specified in the original putnis. He further held that the owners of the estates in which the

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mauzas leased by the original leases had fallen, ought to have been made parties to the suits so that, if this should be found to be the right course, the appellants might be confirmed in the possession of their original mauzas.

The District Judge, whose conclusions on matters of fact must, according to law, be accepted (*see* Code of Civil Procedure, Ss. 100 and 101), found that the estate had not been partitioned privately or at all before the partition of 1897, and that the estate was at that time still held in common tenancy. This being so, the provisions of S. 99 applied if the putni leases in question were to be considered as leases of a share or portion of the joint lands, and there having been no suggestion up to that stage that the putni leases were other than leases of shares or portions, he decreed in favour of the appellants, as already stated.

The Judges of the High Court took the view that he had not found conclusively, and so as to bind them, that the estate was previous to the partition held in common tenancy.

Deeming themselves at liberty to take their own view of the facts in this respect, the learned Judges thought that the lessors had been holding in severalty, and further that the putni leases were not leases of shares or portions, but of specific villages, and therefore that S. 99 did not apply.

This second point, which had not apparently been put before the Courts at earlier stages, was taken in the memorandum of appeal to the High Court, and whether as a substantive point in itself or as supporting the view that the estate was no longer held in common tenancy, deserves consideration, and has been fully considered by their Lordships.

With regard to the first point, the learned Judges of the High Court expressed themselves in the following language:—

"The Court of first instance dismissed the suit on the finding that the proprietors of the estate did not hold the land in common tenancy. That decision was reversed by the Lower Appellate Court on the finding that there was no previous private partition or private arrangement formally entered into by all the proprietors by which each proprietor was in separate possession of some specific land as appertaining to his share in the zamindari.

"On behalf of the respondents it is contended that this finding of the Lower Appellate Court is a finding of fact which is conclusive in second appeal. We are unable to accept this contention. We are bound to accept the finding that there was no formal private partition But on the facts admitted in the plaint and found by the Lower Appellate Court we are unable to hold that S. 99 can be made applicable to the present case. On the plaintiffs' own case their lessors were in actual

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exclusive possession of these 30 villages, and the plaintiffs are further in this dilemma that unless at the time the putni lease was granted this separate possession was consented to by the other co-sharers, they could not have obtained a valid putni lease."

These observations show an insufficient appreciation of the judgment of the District Judge. His language is as follows:—

"Under the circumstances stated and discussed above, I believe the plaintiff-appellants' evidence that the estate No. 4515 was held in common tenancy before the Collectorate partition of 1905.

"As there was no previous private partition or private arrangement formally made and agreed to by all the proprietors by which each proprietor was in separate possession of some specific lands as appertaining to his share in the zamindari, the plaintiffs can now well say under section 99 of the present Estates Partition Act that his putni would hold good only in respect of the lands finally to the share of the grantor of the lease."

He has distinctly found that the estate was held in common tenancy. This is a finding of fact which according to law is conclusive, and which the High Court and their Lordships are bound to accept without further enquiry. But their Lordships will add for the satisfaction of the parties that they would see no reason upon the papers for differing with the District Judge, if it was within their competency to examine the question.

The view to which the High Court leans is a view which one of their number—Mr. Justice Ghose—took in a previous case, a judgment which is printed in the appendix to the present appeal [*Dina Nath Shaha Roy* v. *Chandra Kumar Bose*, decided Feb. 26, 1923].* It is a view that there is some *tertium quid* between common tenancy and several holding, and that when this *tertium quid* exists, if any formal partition supervene, it does not affect or interfere with the arrangement under which landowners who are in some respects still tenants in common may yet have specific shares of the estate allotted to their exclusive enjoyment.

The Act does not apparently contemplate any such cases as being possible. If they were to exist, it would be strange if a formal partition could take away the possession of estates thus enjoyed from former possessors.

In the present case the partition has allotted to the lessors of the plaintiffs lands of which they had not the enjoyment before, and has not allotted to them the mauzas which are now in question.

*The same conclusion on the facts was reached in another case similarly printed (*Prasanna Kumar* v. *Madha Badya*, decided February 21, 1922).

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It is to be observed that the appendix to this case shows that in another instance with similar circumstances the parties agreed that it was held in common tenancy [*Chandra Kumar Mukhopadhya* v. *Dina Nath Shaha Roy*].

The case of *Nagendra Mohan Roy* v. *Pyari Mohan Saha* (1) may be put on one side, as there the two Courts came to concurrent findings of fact.

There remains to be considered the objection that this is not a case which comes under S. 99 because the putni lease, it is said, is not a lease of a share or portion of the estate, but a lease of certain specified mauzas of which the lessors had control and some form of possession at the time when the leases were made, but which by operation of the partition have now been taken away from them.

If their Lordships took this view they would have to consider whether the lessors might not be compelled to make by way of equitable compensation a similar lease of the new mauzas which they had obtained in lieu of the former ones.

On the whole, however, their Lordships think that it will not be necessary to resort to this consideration.

Each lease purports to be a lease of that share in the estate which belongs to the lessors. It is true that it specifically applies to certain mauzas of which the lessors have the enjoyment as representing their share, but it is obvious from the subsequent proceedings that this enjoyment was by convention only and subject to revocation and that as against their lessors, the lessees were entitled to say, "Give us your share, if it be not in these villages, then in those which you get instead." A grant in respect of its amplitude is always construed (unless it be a Crown grant) against the grantor.

It is true that there is no direct authority for such a case, but grants of a share in specified mauzas which are themselves only portions of an estate held in common tenancy, have been treated as coming under S. 99.

The fourth case printed in the appendix [*Gopal Chandra Biswas* v. *Basanta Kumar Sahah Roy*, decided August 18, 1924] is to this effect.

The decision of the High Court of Calcutta upon the construction of a similar section in the earlier Partition Act agrees with this [*Joy Sankari Gupta* v. *Bharat Chandra Bardhan* (2)]. Support is also lent by the decision of this

1. (1915) I L R 43 Cal 103. 2. (1899) I L R 26 Cal. 434.

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Board in *Byjnath Lall* v. *Ramoodeen Chowdry* (3) in the case of a mortgage of an undivided share in certain specified villages which were themselves part of an estate held in common tenancy. This case, it is true, was decided before the Partition Acts and upon the construction of the regulations; but it indicates the principle upon which subsequent legislation has proceeded. The observations on p. 119 are very much in point.

Their Lordships therefore are of opinion that the District Judge was right in holding that S. 99 applies to this case, and they will humbly advise His Majesty that this appeal should be allowed, and that the judgment of the District Judge should be restored with costs.

Solicitors for appellants : *Watkins and Hunter.*

Solicitors for respondents : *Ranken, Ford and Chester.*

H. C. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT :—LORD ATKINSON, LORD CARSON, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Radha Binode Mandal ... *Appellant**

v.

Gopal Jiu Thakur and others ... *Respondents.*

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*Suit for scheme of settlement of debottar property, performance of worship—Plaintiffs and defendants alike described as "shebaits"—Suit not one by the Idol—*Res judicata*—Subsequent suit in Idol's name—Suits not between the same parties—Civil Procedure Code (V of 1908), S.* 11.

A suit brought by the shebaits of a god, against defendants similarly described, on the footing that there is debottar property, for framing a scheme of management and for performance of worship, cannot be regarded as a suit by the god, since he must also be regarded as a defendant, which would be a *reductio ad absurdum.*

A finding in such a suit that the property was not proved to be debottar is not *res judicata* in a subsequent suit for a declaration that the property was owned by the god, in which suit he is a plaintiff, represented by a shebait (one of the defendants in the earlier suit), since the suits are not between the same parties.

Decree of the High Court affirmed on a different ground.

Consolidated appeal from two decrees of the Calcutta High Court reversing two decrees of the Subordinate Judge of 24 Parganas.

*P C Appeal No. 78 of 1925. 25th March, 1927.

3. (1874) L R 1 I A 106.

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The facts are set out in the judgment of their Lordships.

De Gruyther, K. C. and *Kenworthy Brown* for appellant.—The arguments are mentioned in the judgment. The following cases were cited on the point of *res judicata* under the Civil Procedure Code. *Peary Mohan Mukerjee* v. *Ambica Churn Bandopadya* (1) followed in *Rambehari Sarkar* v. *Surendra Nath Ghose* (2); *Chaudhri Risal Singh* v. *Balwant Singh* (3). As holding otherwise it was contended that *Shib Charan Lal* v. *Raghu Nath* (4) was wrongly decided. Under the general law of *res judicata* the following were cited:—*Krishna Behari* v. *Brojeswari Choudranee* (5), *Hook* v. *Administrator-General* (6), and *Ramachandra Rao* v. *Ramachandra Rao* (7).

As regards the nature of the earlier suit *Babijirao* v. *Laxmandas* (8) was cited.

Sir George Lowndes, K. C. and *Dube* for respondents mentioned *Pramatha Nath Mullick* v. *Pradyumna Kumar Mullick* (9) and *Shib Charan Lal* v. *Raghu Nath* (4).

De Gruyther, K. C. replied.

25th March, 1927. The Judgment of their Lordships was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON :—These are consolidated appeals against two decrees of a Division Bench of the High Court of Judicature at Fort William in Bengal, dated the 3rd March, 1924.

The first decree reversed a decree dated the 9th May, 1921, of a learned Subordinate Judge of Alipore, and the second varied a decree of another learned Subordinate Judge of that Court dated the 20th September, 1921.

The decree of the 9th May, 1921, was made in suit No. 155 of 1919, and the decree of the 26th September, 1921, was made in suit No. 214 of 1919.

The appellant to His Majesty in Council in both appeals is Radha Binode Mandal.

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1. (1897) I L R 24 C 900. 2. (1914) 19 C L J 34.
3. (1918) L R 45 I A 168 at 177 : 36 M L J 597 (P C).
4. (1895) I L R 17 A 174. 5. (1875) L R 2 I A 283 at 285.
6. (1921) L R 48 I A 187 : 40 M L J 423 (P C).
7. (1922) L R 49 I A 129 at 137 : I L R 45 M 320 : 43 M L J 78 (P C)
8. (1903) I L R 28 B 216 at 223.
9. (1925) L R 52 I A 245 at 250 : 49 M L J 30 (P C).

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Radha Binode Manda v. Gopal Jiu Thakur

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The suit 155 of 1919 was instituted on the 26th July, 1919. by the plaintiffs (1) Sri Sri God Gopal Jiu Thakur, and (2) Sri Sri God Shambuth Nath Shib Thakur—represented by the Shebait Narendra Nath Mandal. Radha Binode Mandal is the first defendant and there are 19 other defendants.

The shebait plaintiff, Narendra Nath Mandal and the defendants are all members of the Mandal family of Bawali.

The plaint alleges that the properties described in the schedule attached to the plaint are owned and possessed by the plaintiff Thakurs, and that the property numbered 1 is the residential house of the plaintiff Thakurs, where the plaintiff Thakurs have resided with other Thakurs connected with them and where the sheba and worship have been performed. The relief claimed in the suit is for a declaration that the properties in suit are owned and possessed by the plaintiff Thakurs as debottar properties.

At the trial Radha Binode Mandal was the only contesting defendant, and his case was, first, that the suit was barred by reason of *res judicata,* and second, that there was no valid dedication of the properties in suit to the idols and that the properties were not debottar.

The learned Subordinate Judge, who tried the suit, decided both these questions in favour of the defendant Radha Binode Mandal and dismissed the suit with costs.

The plaintiffs appealed to the High Court, and the Division Bench of the High Court, consisting of Chatterji and Cuming, JJ., held that the suit was not barred by reason of *res judicata,* and that the properties mentioned in the schedule to the plaint, except items 14 and 15, were debottar properties.

The suit 214 of 1919 was instituted on the 17th September, 1919. The plaintiff is Radha Binode Mandal and the defendants are the other members of the family.

The plaint alleges that the 28 plots of property, described in the schedule to the plaint in that suit, are ancestral joint properties of the plaintiff and the defendants, and that the plaintiff and the defendants are in joint possession thereof.

The plaintiff claims a declaration that he has a two-annas share in the properties mentioned in the schedule, and he asks for a preliminary decree for partition of the properties.

This suit was contested. The learned trial Judge held as follows: "The evidence shows that the disputed properties

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were the debottar properties, but, subsequently, in suit 206 of 1915 it was decided that the properties were not debottar."

He therefore decided in favour of the plaintiff and made a preliminary decree for partition, and directed a Commissioner to be appointed to effect a partition of the disputed properties.

Certain of the defendants in that suit, including Narendra Nath Mandal, appealed to the High Court, one of the grounds of appeal being that the learned Subordinate Judge should have held that the disputed properties were debottar.

The appeal was heard by the same learned Judges in the High Court, and they stated that in the other appeal they had held that all the properties mentioned in the schedule to the plaint in the suit 214 of 1919, except properties numbered in that schedule 22 and 27 were debottar properties.

They therefore varied the decree of the learned Subordinate Judge and directed that the plaintiff's suit in respect of items other than Nos. 22 and 27 should be dismissed, and they further ordered that the case should be sent back to the Lower Court in order that partition might be effected of items Nos. 22 and 27, in accordance with the directions contained in their judgment.

Radha Binode Mandal has appealed, as already stated, against the two above-mentioned decrees of the High Court.

The arguments, which were presented to their Lordships, related mainly to the suit No. 155 of 1919, which was brought by the two above-mentioned gods, through the shebait, Narendra Nath Mandal, against Radha Binode Mandal and others.

It was contended, on behalf of the appellant in the first place, that the question whether there had been a valid dedication of the properties in suit, and whether they were debottar properties, was *res judicata,* and reliance was placed upon S. 11 of the Civil Procedure Code of 1908.

The material facts which it is necessary to state for the consideration of this argument are as follows:—

In 1914 a suit, No. 212 of 1914, was instituted by Gopal Lal Mandal, Ram Lal Mandal, and six others, against other members of the family, and it was prayed that it might be declared that the properties mentioned in the schedule were debottar properties of Sri Sri Iswar Gopal Jiu Thakur established by the late Peary Lal and Moni Mohan Mandal.

The suit was valued at Rs. 1,87,052.

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This suit was withdrawn on the 5th August, 1915, with liberty to bring a fresh suit.

On the 24th September, 1915, another suit (No. 206 of 1915) was instituted by Gopal Lal Mandal and Ram Lal Mandal. In the plaint the plaintiffs were described as "Sri Sri Iswar Gopal Jiu Thakur's Shebaits."

Gopal Lal and Ram Lal Mandal are defendants 2 and 3 in the present suit (No. 155 of 1919).

The defendants in the 1915 suit, nineteen in number, were the other members of the Mandal family, and they included Narendra Nath Mandal and Radha Binode Mandal.

The defendants also were described as "Sri Sri Iswar Gopal Jiu Thakur's Shebaits."

The first prayer in the plaint was as follows:—

"That all the properties, being debottar properties of Sri Sri Iswar Gopal Jiu Thakur established by the said Peary Lal Mandal and Moni Mohan Mandal, a scheme may be framed for the preservation, management and improvement of the said properties, and for the efficient performance of the daily and periodical shebas of Sri Sri Iswar Gopal Jiu Thakur and the festivals, etc."

There was a further prayer that a manager or trustee should be appointed.

The plaint contained allegations that the defendant No. 10, viz., Radha Binode Mandal and certain other defendants, had been putting obstacles in the way of the collection of rents and of the management of the properties, and that on account of difference of opinion among the shebaits it had become very difficult to manage the debottar estate properly, to collect rents and to perform the deb-sheba, etc., in a proper way.

Radha Binode Mandal (defendant No. 10 in the 1915 suit) denied that the properties were debottar.

Among other issues the following issues were stated in the Court of the learned Subordinate Judge who tried the suit:

"(3) Is the suit maintainable in its present form?

"(5) Are the properties described in the schedule of the plaint debottar properties? Was there any valid arpannama or dedication of the same to the Thakur Sri Sri Gopal Jiu?"

On the third issue, the learned Subordinate Judge held that the frame of the suit was defective. He was of opinion that the plaintiffs should have directly prayed for a declaration that the properties of the plaint were dedicated debottar properties.

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He pointed out that in the previous suit (viz., the 1914 suit) such a prayer was made; that the Court called for *ad valorem* Court-fees on the value of the properties; that the plaintiffs in that suit were unwilling to pay such fees, and that the suit was withdrawn.

He came to the conclusion that the 1915 suit had been framed in a slightly different form in respect of practically the same relief, and with a view to avoid the payment of a large amount of Court-fees. He therefore held that the suit was not maintainable as framed.

Although the learned Judge had come to the above-mentioned conclusion, that the suit as framed was not maintainable, he proceeded to consider the fifth issue, and in respect thereof he held that the plaintiffs had failed to prove that the properties were debottar. This decision was on the 31st July, 1916.

There was an appeal by the plaintiffs to the learned District Judge, who held that the plaintiffs had not succeeded in establishing an absolute endowment, and he agreed with the learned Subordinate Judge that the suit was not maintainable in its present form. He said:—

"The character of the property was a direct issue in the case and the plaintiffs should not have attempted to obtain a decision on this direct issue by bringing a suit in such a form as to avoid the payment of a larger amount in Court-fees."

The appeal accordingly was dismissed with costs. This was on the 19th July, 1917.

As already stated, the suit, now under consideration, No. 155 of 1919, was instituted on the 26th July, 1919.

The seventh issue at the trial of that suit was, "Is the suit barred by the principles of *res judicata*?"

The learned Subordinate Judge held that the judgment in the suit, No. 206 of 1915, operated as *res judicata*.

The Division Bench of the High Court came to the conclusion that the decision in the 1915 suit did not operate as *res judicata*, and the learned Judges stated several reasons for the conclusion at which they arrived.

The above-mentioned reasons were fully debated and considered during the arguments, but their Lordships do not think it necessary to refer to them in detail because, in their Lordships' opinion, this part of the case should be disposed of on one consideration which goes to the root of the matter.

The plaintiffs in the suit which is now under consideration, viz., No. 155 of 1919, are the two gods, Gopal Jiu Thakur

and Shambuth Nath Shib Thakur, suing by the Shebait Narendra Nath Mandal.

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In their Lordships' opinion, these two gods were not parties to the 1915 suit.

It is true that in the 1915 suit the plaintiffs were described as "Sri Sri Iswar Gopal Jiu Thakur's Shebaits," and it was argued that the 1915 suit must therefore be regarded as having been brought on behalf of the deity "Gopal Jiu."

Their Lordships, however, are not prepared to accept that argument.

It is to be noted that not only were the plaintiffs described as the shebaits of the god, but the defendants also were described in the same way. Therefore, if the god Gopal Jiu were to be regarded as a plaintiff, he must also be regarded as a defendant, which would be a *reductio ad absurdum.*

For the consideration of this point, however, it is necessary to examine not only the heading of the plaint, but also the allegations therein.

In their Lordships' opinion, the allegations in the plaint show that the 1915 suit was based upon the assumption that the properties were debottar properties, and that the suit was brought for the purpose of having a scheme framed by the Court for the preservation and management of the properties and for the performance of the daily and periodical shebas.

The suit, it was alleged, had become necessary by reason of the disputes as to the management of the properties between the plaintiffs and some of the defendants, all of whom were alleged to be shebaits of the god, and it was apparently not thought necessary to make the two gods, the plaintiffs in the present suit, parties to the 1915 suit.

In their Lordships' opinion the description of the plaintiffs and the defendants in the 1915 suit as shebaits of the Thakur, and the nature of the suit, as disclosed by the allegations in the plaint, are not sufficient to constitute the 1915 suit a suit by or on behalf of the gods, who are the plaintiffs in the present suit, viz., No. 155 of 1919.

The result, therefore, in their Lordships' opinion, is that the suit of 1915 was not between the same parties as the parties in the suit now before the Board; the case, therefore, does not fall within S. 11 of the Code of Civil Procedure, 1908, or with-

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in the statement of the general law made in *Krishna Behari Roy* v. *Brojeswari Chowdranee* (1).

For the above-mentioned reason, their Lordships are of opinion that the conclusion, at which the learned Judges of the High Court arrived on the issue of *res judicata,* was correct.

They desire to guard themselves by saying that they must not be taken as adopting the grounds upon which the decision of the High Court was based. They express no opinion on any ground other than that which has been hereinbefore dealt with.

Secondly, it was argued on behalf of the appellant that the decision of the learned Judges of the High Court as to the character of the properties in suit was wrong.

Their Lordships had the advantage of a very careful and elaborate examination of the documents and evidence presented to them by the learned counsel who appeared on behalf of the appellants.

They have the further advantage of a judgment of the High Court, which is conspicuous for the care with which it was obviously prepared. All the material points, which were urged by the learned counsel for the appellant, were referred to and considered by the learned Judges of the High Court, and no fault could be found with the accurate statement of the facts and evidence in relation to such matters.

In their Lordships' opinion there is only one question on this part of the case, viz., whether the learned Judges were justified in drawing the inference from the evidence, to which they referred, that the properties descirbed in the schedule, with the exception of two items, were debottar properties.

Their Lordships, having come to a clear conclusion during the course of the argument, did not think it necessary to call upon the learned counsel for the respondents for an answer on this part of the case.

In their Lordships' opinion, there was ample evidence in the case to justify the inference which the learned Judges drew as to the character of the properties.

Their Lordships, therefore, are of opinion that the appeal of Radha Binode Mandal against the decree of the High Court in the suit No. 155 of 1919 fails. It follows as a necessary consequence of the findings of the High Court being upheld, that the appeal of Radha Binode Mandal against the decree of the High Court in suit No. 214 of 1919 also must fail.

1. (1875) L R 2 I A 283 at 285.

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Their Lordships, therefore, are of opinion that both the appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant : *T. L. Wilson & Co.*

Solicitors for respondents : *Watkins & Hunter.*

H. C. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Konakalla Rama Rao ... *Petitioner**
(*Plaintiff—Cr. Petitioner*)

v.

Nallari Pitchayya ... ... *Respondent*
(*Defendant—Petitioner*).

Rama Rao v. Pitchayya.

Village Courts Act (*I of* 1889), *S.* 73—*Panchayat Court—Levy of stamp duty and penalty in respect of promissory notes—Decision on merits—Stamp Act, Ss.* 35 *and* 36—*Reversal of decision by District Munsif—Legality—Revision—Interference—Civil Procedure Code, S.* 115.

A suit was filed before the Village Panchayat Court to recover a certain sum of money, the claim being based on two unstamped documents. The Panchayat Court found that the two documents ought to be stamped with a stamp of three annas each and collected Rs. 5-3-0 for each document, consisting of 3 annas for stamp and Rs 5 for penalty and decreed the claim. There was a revision petition to the District Munsif's Court under S. 73 of the Village Courts Act. The District Munsif construed the two documents as promissory notes and held that the suit failed as it was based on unstamped promissory notes and that the Village Court could not levy penalty in respect of them, and consequently reversed the decision of the Panchayat Court. The plaintiff applied to the High Court in revision.

Held (1) that the High Court has got power to interfere in revision under S. 115, Civil Procedure Code, against an order of the District Munsif passed under S. 73 of the Village Courts Act; (2) that, though the Panchayat Court had no power to levy penalty in respect of the promissory notes and admit them in evidence under section 35 of the Stamp Act, still, after it did so, it was not open to the District Munsif to rake up the question and set aside the judgment on the merits, and that therefore the order of the District Munsif should be set aside and the decision of the Panchayat Court restored.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order dated the 15th December, 1924 of the Court of the District Munsif of Bezwada in O. P. No. 22 of 1924 presented

*C. R. P. No. 794 of 1925. 21st January, 1927.

Rama Rao v. Pitchayya.

against the decree of the Village Panchayat Court of Bezwada in Suit No. 353 of 1924.

P. Satyanarayana Rao for petitioner.

V. Subramaniam for respondent.

The Court delivered the following

JUDGMENT :—This Civil Revision Petition arises out of a suit filed before the Village Panchayat Court of Bezwada to recover Rs. 21 and odd. The suit was based on two documents, Exhibits A and B, dated 2nd February and 13th January, 1923 respectively. The Panchayat Court found that these two documents ought to be stamped with a stamp of three annas each and collected Rs. 5-3-0 for each document, consisting of three annas for stamp and five rupees for penalty, and decreed the claim. There was a revision petition to the District Munsif's Court of Bezwada under S. 73 of the Village Courts Act (I of 1889). The District Munsif held that the Village Court could not levy penalty in respect of a promissory note. He construed Exhibits A and B to be promissory notes and that the suit failed as it was based on unstamped promissory notes. He also held that the village panchayat exercised jurisdiction not vested by law or otherwise acted illegally, and reversed the decision of the Panchayat Court. The plaintiff files this revision petition.

An objection is taken by the respondent that the revision does not lie. Powers of revision against the orders of District Munsifs under S. 73 of the Village Courts Act have been exercised by the High Courts in *Giddayya* v. *Jagannatha Rau* (1) and *Palani Goindan* v. *Kuppanda Goundan* (2) without any objection. In *Paramasivam Pillai* v. *Periyanayagathammal*(3) the petitioner before the Court argued that the C. P. C. does not apply to petitions under S. 73 before the District Munsif. As to this, the learned Judge, Kumaraswami Sastri, J. remarked that it is unnecessary to consider. But he observed that it was difficult to see how the argument of the petitioner who filed the petition could be said to be correct. There was a Letters Patent Appeal against this in *Paramasivam Pillai* v. *Periyanayagathammal* (3). The Judges did not express any final view on the matter except that if an order of the District Munsif cannot be revised under S. 115, C. P. C., it can be

1. (1897) I L R 21 M 363.
2. (1900) I L R 24 M 335: 11 M L J 189.
3. (1915) 32 I C 527.

Rama Rao v. Pitchayya.

revised under the Charter Act. I agree with the view. But apart from this, I feel no doubt that the High Court can interfere in revision under S. 115, C. P. C. The District Munsif acts as a Court subordinate to the High Court and the conditions of S. 115 are satisfied. The C. P. C. is a general Act, and it is unnecessary to consider the question how far other sections of the Code apply to village Courts. Assuming they do not, I do not think that that consideration prevents the application of S. 115 to petitions before the District Munsifs under S. 73 of that Act.

Coming to the merits of this case Mr. P. Satyanarayana appearing for the petitioner mainly relies on S. 36 of the Stamp Act. It seems to me that Exhibits A and B are promissory notes within the definition of that term in the Stamp Act. That being so, under S. 35 of the Stamp Act, the village Court has no power to levy penalty in respect of a promissory note. At any rate, proviso (*a*) of that section does not enable a litigant to insist on penalty being taken and to admit the unstamped document in evidence. But all the same in this case the Village Panchayat Court collected stamp duty and the penalty and admitted the documents in evidence. It is not clear what the construction of the documents they adopted was. With the help of the learned vakils for the petitioner and the respondent I examined the matter fully and so far as we can see it looks as if the Village Panchayat Court thought that the documents were promissory notes payable not on demand but on the expiry of a month from the dates of their execution and therefore the proper stamp duty payable was the stamp duty payable on a bill of exchange for the same value, which would be three annas. The amount of three annas collected by them for each document is not explainable on any other footing. This on the construction of S. 35 is undoubtedly erroneous. But Mr. Satyanarayana relies, as I have already said, on S. 36, and on two decisions in *Devachand* v. *Hirachand Kamaraj* (4) and *Venkatarama Aiyar* v. *Chella Pillai* (5). In the first of these cases, the first Court considered certain documents to be bonds and levied stamp duty. The case came up before a Division Bench of the Bombay High Court when Birdwood and Parsons, JJ. differed. The matter came up on Letters Patent Appeal before a Bench of three Judges. All the five Judges were of opinion that the documents in that case were promissory notes and not

4. (1889) I L R 13 B 449 (F B). 5. (1920) 40 M L J 479.

Rama Rao v. Pitchayya.

bonds and that the penalty was wrongly levied under S. 34 (3) of the Stamp Act then in force. But Birdwood, J., thought that in such a case the judgment ought to be reserved by the Appellate Court, whereas Parsons, J., and the three Judges in appeal were all of the opinion that S. 36 of the Stamp Act cures such an irregularity. Where the trial Judge collected the stamp duty the document becomes a stamped document and the question whether it is duly stamped cannot be considered by the Appellate Court under S. 36. That is the view taken by the Full Bench. This case was followed in *Venkatarama Aiyar* v. *Chella Pillai* (5). Oldfield, J., pointed out that the language of the Indian Act is somewhat wider than that of the English Act, O. 39, R. 8 and he also pointed out that the Legislature left the section of the Stamp Act substantially unaltered after the decision of the Bombay High Court. There being no difference in the language between S. 36 of Act II of 1899 and sub-section 3 of S. 34 of Act I of 1879, the consideration mentioned by Oldfield, J., will hold good. That the Legislature has not thought fit to change the language of S. 36 shows that they adopted the view enunciated in *Devachand* v. *Hirachand Kamaraj* (4). A distinction has been attempted between these two decisions and the present case on the ground that the trial Courts in those two cases construed the documents to be a bond and an agreement and not promissory notes and though S. 36 may cure a wrong construction of that kind, it will not cure a case where a trial Court while construing the document to be a promissory note wrongly levied penalty under S. 35. But I am not able to see very much in this distinction. In either case it is an error of law and it is an error with reference to Stamp Law. In those decisions the error is one of finding out under what definition in the Stamp Act the document fails. In the present case, it is a question of applying the provisions of S. 35. In either case it may be said that the trial Court has acted erroneously. If in the one case S. 36 of the Stamp Act prevents an Appellate Court from interfering I do not see how it can enable the Appellate Court to interfere in the other case. Following these decisions I am of opinion that while the Panchayat Court might have been wrong in applying the provisions of S. 35 after they have done so and collected the stamp duty and the penalty which have been paid to Government and the documents have been admitted in evidence, it is

4. (1889) I L R 13 B 449 (F B). 5. (1920) 40 M L J 479.

not open to the District Munsif to rake up the question and set aside their judgment. After all, as Parsons, J., has pointed out, the Stamp Act is a fiscal provision; its object is to protect revenue and its object has been satisfied in this case. The Government has got its revenue and there is nothing absurd in the plaintiff being given a decree. The District Munsif cannot therefore say that the Panchayat Court exercised jurisdiction not vested by law or otherwise acted illegally. The existence of S. 36 itself shows that a wrong application of S. 35 should never be considered as an error of jurisdiction or a material irregularity. That is implied by the two decisions already relied on by me. If so, the District Munsif's action in overlooking S. 36 to which no reference is made and interfering with the decision of the Panchayat Court is a case where he confers jurisdiction on himself by an error of law and therefore acted without jurisdiction—see *Atchayya* v. *Sri Seetharamachandra Rao* (6). All that can be said for the District Munsif's order is, it would be a correct order if he was the first Court to try the case. But as it is, it is a wrong order on the merits. Mr. Subramaniam contended that it is unnecessary for me to interfere in the interests of justice. I would have been very glad not to interfere in this case if the interests of justice did not require it, but I am of the opposite opinion. There is no doubt the defendant borrowed money from the plaintiff and whatever irregularity there might be, the Panchayat Court did levy stamp duty. Now that they have levied stamp duty and gave a decree to the plaintiff, it is unnecessary for any appellate Court to set aside that order on purely technical grounds. The omission of the words "or contrary to law" in sub-section (3) of S. 73 by the Amending Act. of 1920 shows that a decree may be just though contrary to law and a decision though contrary to law need not be unjust. Following the spirit of that amendment the decree of the Panchayat Court is just and ought not to have been interfered with. I therefore set aside the order of the District Munsif with costs here and in the Lower Court.

N. S. *Revision Petition allowed.*

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6. (1912) I L R 39 M 195: 24 M L J 112 (F B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE CURGENVEN.

Simhadri Venkatanarasayya ... *Appellant** (*Respondent*)

v.

The Official Receiver, Godavari ... *Respondent* (*Petitioner*).

Simhadri Venkatanarasayya v. The Official Receiver, Godavari.

Provincial Insolvency Act (V of 1920), Ss 28 (7) and 53—Alienation by insolvent more than 2 years before the date of the order of adjudication but within 2 years of the date of the presentation of the petition for insolvency—Power of Insolvency Court to set aside.

The provisions of S. 28 (7) of the Provincial Insolvency Act are applicable to S. 53 and an alienation made by the insolvent more than 2 years before the date of the order of adjudication but within two years of the date of the presentation of the petition for insolvency can be set aside by the Insolvency Court under S. 53.

Sheonath Singh v *Munshi Ram,* (1920) I L R 42 A 433, *Rakhal Chandra Purkait* v. *Sudhindra Nath Bose,* (1919) I L R 46 C 991, *Sankaranarayana Aiyar* v. *Alagiri Aiyar,* (1918) 35 M L J 296 and *Rangiah* v. *Appaji Rao,* (1926) 51 M L J 719 followed.

Nagindas v. *Gordhandas,* (1925) I L R 49 B 730 and *Ghulam Muhammad* v. *Panna Ram,* (1922) 72 I C 433 not followed.

Appeal against the order of the District Court of Godavari at Rajahmundry, dated 1st September, 1925 in I. A. No. 669 of 1923 in I. P. No. 8 of 1922.

G. Lakshmanna for appellant.

P. Somasundaram for respondent.

The Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—The first point urged in this case by Mr. Lakshmanna for the appellant is one of law and the appeal is from the order of the District Judge of Godavari on a petition under S. 53 of the Provincial Insolvency Act asking for the cancellation of a certain mortgage deed executed by the insolvent in favour of the respondent on the 26th of July, 1920, Exhibit I. The point of law is that although the mortgage deed in question was executed on the 26th of July 1920 and the adjudication was on the 24th of October, 1922 the petition for adjudication is dated the 25th of April 1922 or within two years of the execution of the mortgage deed in question. So that it comes to this; that if the provisions of S. 28 (7) of the Provincial Insolvency Act, which says that an order of adjudication shall relate back to, and take effect from, the date of the presentation of the petition on

* A. A. O. No. 435 of 1925. 2nd February, 1927.

Simhadri Venkata-narasayya v The Official Receiver, Godavari.

Odgers, J.

which it is made, are to be applied to S. 53, then the transaction in question is clearly within the section. If, on the other hand, the provisions of S. 28 (7) are not to be applied to S. 53 then the transaction is out of reach of the Insolvency Court by reason of having taken place more than two years from the date of the adjudication. Now Mr. Lakshmanna frankly admits that there is one case of this Court *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (1) against him, which was a decision of a Bench consisting of Oldfield and Sadasiva Aiyar, JJ., under the old Provincial Insolvency Act (III of 1907), the wording of which however, as far as is material, is precisely the same as in the Act of 1920. There the learned Judges have held that having regard to S. 16 (6) of the Act of 1907 the adjudication referred to in S. 36 must be treated as made on the date of presentation of the petition in which the insolvency proceedings originated. Two other High Courts have, however, apparently come to an opposite view, namely, the Bombay High Court, in *Nagindas* v. *Gordhandas* (2) and the Lahore High Court in *Ghulam Muhammad* v. *Panna Ram* (3). So that, what Mr. Lakshmanna asks us to do is that in view of these two decisions to refer the matter to a Full Bench to see if the decision of this Court already referred to in *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (1) is correct or not. It has to be pointed out that the decision in *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (1) receives a further support from a recent case before Devadoss and Sundaram Chetti, JJ., *Rangiah* v. *Appaji Rao* (4). In that case the learned Judges came to the conclusion that the decisions of the Bombay and Lahore High Courts referred to above could not be supported. There is further the authority of the Calcutta High Court in *Rakhal Chandra Purkait* v. *Sudhindranath Bose* (5) and of *Sheonath Singh* v. *Munshi Ram* (6) which supports the view hitherto taken in Madras. The Calcutta decision was under the old Provincial Insolvency Act, but, as already pointed out, the wording of the two as regards this point is the same. The same remark will apply to the Allahabad case. Now a word must be said about the Bombay case which is relied on to cast a doubt on the soundness of the Madras decisions. The reasoning turns on the difference in language which undoubtedly exists between Ss. 53 and 54. The

1. (1918) 35 M L J 296. 2. (1925) I L R 49 B 730.
3. (1922) 72 I C 433. 4. (1926) 51 M L J 719.
5. (1919) I L R 46 C 991. 6. (1920) I L R 42 A 433.

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learned Chief Justice of Bombay says that he cannot infer that owing to the difference in language in the two sections S. 53 was intended to attract the provisions of S. 28 (7). He also seems to base his decision on S. 42 of the English Act which runs

"any settlement of property . . . shall, if the settlor becomes bankrupt within two years after the date of settlement, be void against the trustee in bankruptcy."

and the decision of Wright, J., is quoted in Ex parte *Clough* (7) to the effect that the words "becomes bankrupt" mean a date on which an available act of bankruptcy has been committed by the bankrupt. With great deference I do not see how this construction of the English Bankruptcy Act helps the construction contended for by the learned Chief Justice, because if the commencement of bankruptcy or an insolvency is to be the date of an available act of bankruptcy it appears to me that that must occur at some time, however short, before the presentation of a petition in insolvency which must, if it is going to have any weight at all, be based on an allegation of an available act of bankruptcy or insolvency in this country. The learned Chief Justice seems to realise that harm and injustice might result from taking the opposite view, but he says that any such fear cannot provide sufficient grounds for interpreting the words in S. 53 otherwise than according to their clear meaning. It appears to me that the object of both Ss. 53 and 54 is really to decide (as in fact the heading at the top of S. 51 makes clear, *i. e.,* what is the effect of insolvency on certain antecedent transactions by the insolvent) what property is to vest in the Receiver and it is clear that you must set some limit of time with respect to transactions which you are going to allow to be impeached on the ground that they are in fraud of creditors and that the properties sought to be alienated ought in fact to form part of the assets of the insolvent which on his adjudicating pass to the Official Receiver of his estate. So that, if you are going to make the date of adjudication the crucial test, as pointed out in *Rangiah* v. *Appaji Rao* (4) this may take place a very long time after not only the presentation of the petition but any act of bankruptcy committed by the insolvent. In the face of two clear authorities in this Court and of the authorities mentioned in Calcutta and Allahabad, it seems to me quite clear that the provisions of S. 28 (7) are attracted to S. 53. I have not referred in detail

4. (1926) 51 M L J 719. 7. (1904) 1 K B 451.

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to the decision in Lahore, *Ghulam Muhammad* v. *Panna Ram* (3), which approves of *Jokhan Singh* v. *Deputy Commissioner, Fyzabad* (8), a judgment by one of the Commissioners of the Nagpur Court disapproving of the body of authority which I have referred to, namely, *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (1), *Sheonath Singh* v. *Munshi Ram* (6) and *Rakhal Chandra Purkait* v. *Sudhindranath Bose* (5). The learned Judges in the Lahore case observed that the act cannot be interpreted with reference to what the framers of the Act intended to do and based their decision on the difference in the language of the sections. In face of all this authority in favour of the incorporation of S. 28 (7) in S. 53 I must say that, speaking for myself, I entertain no doubt as to the correctness of the Madras decisions reinforced as they are by the opinions of Calcutta and Allahabad and I see no reason for referring this case to a Full Bench.

Now on the question of merits, the alienee is the brother-in-law of the insolvent. It is proved that attachments were about to be made on his property. The mortgage which is executed on old stamp papers is sought to be supported as far as consideration goes by several promissory notes, Exhibits 2, 3 and 4. The promissory notes were in favour of the father of the mortgagee and the learned Judge comes to the conclusion that Exhibits 3 and 4 have been [illegible]ntly prepared for the purpose of showing consideration [illegible] Exhibit I. As to the amount of Rs. 250 said to have been borrowed by the respondent from R. W. 4, this witness states that the respondent told him that he was borrowing the money in order to lend to his brother-in-law. There is an entry in a Day Book, Exhibit 6; there is no entry in the corresponding ledger, Ex. G, the explanation being that the loan was paid off within a short time. This does not appear to me to be a satisfactory explanation and it was an explanation which was not accepted by the learned Judge. The insolvent and the respondent are both stated to maintain accounts. They are both Komaties and they are both persons carrying on business. The likelihood therefore is that they did maintain accounts, but their accounts are not forthcoming. The learned District Judge has come to the conclusion that Exhibit 1 was executed in hot haste in order to make

1. (1918) 35 M L J 296. 3 (1922) 72 I C 433.
5. (1919) I L R 46 C 991.
6. (1920) I L R 42 A 433. 8. (1913) 23 I C 924.

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the attachment before judgment a nullity and in my opinion we have been shown nothing here on appeal or in the evidence which would enable one to say that he was not justified in coming to that conclusion. In my opinion the appeal must be dismissed with costs.

Curgenven, J.

Curgenven, J. :—I agree and have very little to add to what my learned brother has said on the first point raised with regard to the applicability of S. 53 of the Provincial Insolvency Act. The question is whether the two years provided by that section should be reckoned from the date of the alienation up to the date of the petition or up to the date of the adjudication. For the former view we have specially been referred to *Nagindas* v. *Gordhandas* (2). The main ground for that decision lay in a comparison between the language of S. 53 and S. 54. There is no doubt that that is a consideration to be weighed, but having regard to the existence and terms of S. 28 (7) I do not think it can be called a conclusive test. The view that time should run up to the date of adjudication appears to me to have nothing in reason to recommend it. It seems incontestable that the critical date should be, if not, as in English law, the point of time when the debtor becomes bankrupt, then at latest when the petition is filed. The length of the interval thereafter up to adjudication depends largely upon accidental circumstances which can have no logical connection with the conduct of the debtor up to the time when his affairs passed into the hands of the Insolvency Court. It is true that it is not for us to say what the law should be, but we are entitled in case of doubt to reject an alternative which must lead to undesirable if not to anomalous results. The other alternative is to read S. 28 (7) with S. 53, and for this course we have the authority of the judgments of two Benches of this Court, *Sankaranarayana Aiyar* v. *Alagiri Aiyar* (1) and *Rangiah* v. *Appaji Rao* (4) besides the views of the Calcutta and Allahabad High Courts. I respectfully express my preference for this view over that taken by the High Courts of Bombay and Lahore.

With regard to the merits, the mortgage bond purported to have been executed on 26th July, 1920, but it was not registered until the 30th. Notwithstanding the presence of a stamp vendor at the place of execution it was engrossed upon papers the stamps of which bore the names of third parties. At

1. (1918) 35 M L J 296. 2. (1925) I L R 49 B 730.
4. (1926) 51 M L J 719.

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about the same time, the creditor, P. W. 1, was taking steps to attach this property, which by then was the sole property remaining to the debtor The mortgagee was not only the debtor's brother-in-law but he was also the junior member of the family to which he belonged. All these circumstances raise, I think, a strong suspicion that the document was got up for the purpose of defeating creditors, as they stood at the time, and accordingly it lies very strongly upon the insolvent to prove that it was executed in good faith and for consideration. The appellant relied upon certain promissory notes which certainly by themselves afford no proof as they might have been got up between himself and his brother-in-law at any time The oral evidence carries little weight, and there are only two pieces of documentary evidence which, I think, deserve any serious consideration. One of these is a post card, Ex. 5, which was written by the insolvent to the appellant in 1914. It no doubt contains a request to have Rs. 400 ready for him, but it neither shows that Rs. 400 was actually lent nor that it found the subject-matter of either of the promissory notes. The most it may show is that there were money dealings. The other piece of evidence is an account produced by R. W. 4 in order to substantiate a loan of Rs. 250, which he is alleged to have made to the mortgagee as part of the consideration under one of the notes. The learned District Judge has discredited the evidence of this witness and of his account, but even assuming that the account entry is true and evidences a true loan, there is again nothing to show that this money was lent to the mortgagee for the purpose of making the loan. The parties are Komaties and their own failure to produce accounts is certainly not without significance. I agree that the onus to show that the transaction was in good faith and for consideration has not been discharged and that the Civil Miscellaneous Appeal should be dismissed with costs.

N. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

T. R. Kaliaperumal Naicker and others ... *Appellants** (*Defendants* 3, 6 *and* 7)

v.

O. S. Ramachandra Aiyar, Official Receiver in I. P. No. 38 of 1919 on the file of the Court of the District Munsif of Kumbakonam (ceased to be O. R.) and another ... *Respondents* (*Plaintiff 8th defendant and substitute for the plaintiff*).

Kaliaperumal Naicker v. Ramachandra Aiyar.

Provincial Insolvency Act (*V of* 1920), *S.* 29—*Institution of suit against defendant after presentation of insolvency petition by him but before order of adjudication—If defective—Subsequent addition of the Official Receiver as party-defendant—Limitation—Limitation Act, S.* 22—*Leave of Court to institute suit not obtained—Effect—Interim Receiver—Appointment of—Effect.*

The owner of the equity of redemption in certain properties presented a petition to be adjudicated an insolvent on 16th November, 1920. A suit was filed on the mortgage on 26th October, 1921 impleading this person as the defendant. On 20th December, 1921 the order of adjudication was passed. On 25th April, 1922 the plaintiff applied to implead the Official Receiver also as a defendant.

Held (1) that the institution of the suit against the owner of the equity of redemption alone without the Official Receiver as a party was not defective as he was not an essential party to the suit in the sense that his absence would be fatal to the suit; (2) that there was no limitation for the impleading of the Official Receiver and the suit was not barred under S. 22 of the Limitation Act; (3) that there was no necessity to obtain the leave of the Court for the institution of the suit as the suit was filed before the date of the order of adjudication.

O. 22 of the Civil Procedure Code deals with the devolution of interest by operation of law and not by act of parties. Though there, is a rule dealing with the position of a plaintiff becoming an insolvent, there is no rule dealing with a defendant becoming an insolvent. S. 29 of the Provincial Insolvency Act of 1920 provides for such a case.

"The filing of a suit prior to the adjudication must be regarded outside the purpose of the Insolvency Act with reference to the provisions of S. 28 (2) of the Act and the bringing in of the Official Receiver as a party to the suit is merely a matter of compliance with such orders as the Court may pass under S. 29 of the Act.

The order of appointment of *interim* Receiver has not got the same effect as the vesting order or the order of adjudication.

*S A No. 891 of 1925. 1st February, 1927.

Kallaperumal Naicker v Ramachandra Aiyar.

Second Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in A. S. No. 37 of 1924 presented against the decree of the Court of the District Munsif of Kumbakonam in O. S. No. 606 of 1921.

Watrap S. Subramania Aiyar for appellants.

R. Kuppuswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The facts of this second appeal may be stated as follows:—The first defendant Somu Asari executed a deed of mortgage, Ex. A, on 27th October, 1907 in favour of one Govinda Asari for Rs. 100 payable in two years with interest at 12 per cent. per annum and a higher interest in default. Govinda Asari, the mortgagee, died on 19th August, 1914, leaving two sons, Amirthalinga Asari and Chinnasami Asari. In a partition between the sons the suit debt fell to the share of Amirthalinga Asari. He was declared an insolvent and his properties vested in the Official Receiver of Tanjore who files this suit for recovery of money due on the mortgage deed. The suit was filed on 26th October 1921. The suit was originally filed against four defendants and we may ignore the fourth defendant for the present. The second defendant purchased the property from the 1st defendant. The 3rd defendant again purchased the property in execution of a decree against the 2nd defendant. The 3rd defendant filed an application for being declared an insolvent on 16th November, 1920. Under S. 20 of the Provincial Insolvency Act, the Official Receiver was appointed *interim* Receiver on 17th January, 1921. On 20th December, 1921, an adjudication order was passed. On 25th April 1922 the plaintiff applied that the Official Receiver of Tanjore in the capacity of a Receiver of the estate of the 3rd defendant should be made a defendant and he was accordingly made the 5th defendant. The only point raised in the Lower Appellate Court and argued before me is whether the suit is barred by limitation by reason of the 5th defendant being impleaded in the suit on 25th April, 1922, which was more than 12 years from the date when the cause of action arose. Mr. Watrap S. Subramania Aiyar who appears for the appellants relies on S. 28 (7) which says that an order of adjudication shall relate back and take effect from the date of the presentation of the petition on which it is made. He contends that the effect of the order of adjudication and the vesting order which followed is that it must be taken that the adjudication and the

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vesting were made on 16th November, 1920, the date of the application, and if the suit was filed after that date without the Official Receiver as a party it was defective, and as the defect was cured by bringing him as a party on 25th April, 1922 the suit is barred under S. 22 of the Limitation Act.

Order 22 of the Civil Procedure Code deals with the devolution of interest by the operation of law and not by act of parties. Though there is a rule dealing with the position of a plaintiff becoming an insolvent there is no rule dealing with a defendant becoming an insolvent. If there is no provision of law then the case of the defendant becoming an insolvent is strictly like any other case of devolution. The Official Receiver in insolvency may be regarded as a continuation of the original defendant. If the suit was filed prior to the order of adjudication, the only possible person who can be made defendant is the party himself, and all that can be done is, that if he is declared an insolvent afterwards, to bring as a party the Official Receiver on whom the interest has devolved, if one so chooses. But now, Act V of 1920, S. 29 provides for the case of a defendant who has been adjudicated an insolvent. S. 29 says:

> "Any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made against him under this Act, either stay the proceeding or allow it to continue on such terms as such Court may impose."

If the Court allowed the suit imposing some further terms it can proceed only on those terms being complied with. If the Court insisted on the Official Receiver being brought in as a defendant the Official Receiver will have to be brought in. But he will have to be brought in not because he is an essential party to the suit in the sense that his absence is fatal to the suit and if he is impleaded at a later date the suit will be regarded as filed on that date, but because of the provisions of S. 29 of the new Act. The suit was rightly filed on 26th October, 1921 and there is a devolution of interest on the Receiver who is merely a continuation of the original defendant. S. 28 (7) must be read in conjunction with Ss. 28 (2) and 29. S. 28 (2) says that, if suits or legal proceedings are taken after the order of adjudication they shall not be commenced except with the leave of the Court on such terms as the Court may impose. But we are not concerned here with a suit filed after the order of adjudication. The present suit was filed before the order

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of adjudication and as it was then filed, it was properly filed and not defective. The appellant contends that the plaintiff had not obtained the leave of Court for the filing of that suit. Mr. Subramania Aiyar refers me to a number of cases under S. 28 (7). Most of these cases had to do with the effect of dealings by the insolvent in the interval between the application and adjudication. For instance, in *Sheonath Singh* v. *Munshi Ram* (1) it was held that alienations by the insolvent are not valid against the Official Receiver. The effect of S. 28 (7) was correctly described there. The actual sections referred to there are the corresponding sections of the old Act.

"No vesting takes place until an order of adjudication is made. It is the making of the order of adjudication which vests the property and only upon such an order being made can any vesting take place at all. But once the order is made the effect created by it is, by a legal fiction, taken to relate back to the presentation of the petition or in other words the commencement of the insolvency."

For all purposes of the Insolvency Act this fiction has to be used and it is a very useful fiction; but outside those purposes it has no place. The filing of a suit prior to the adjudication may be regarded outside the purpose of the Insolvency Act with reference to the provisions of S. 28 (2). The decision in *Subramania Aiyar* v. *Ramakrishna Aiyar* (2) relates to a case where a suit was filed after adjudication. There the learned Judges referred to the order dating back to the petition. All the other cases referred to by Mr. Subramania Aiyar are not cases relating to insolvency but generally cases on the effect of a party being brought in at a later stage of the suit when the suit was defective without the presence of the party earlier. I do not think that those cases have anything to do with the matter before me. To hold otherwise would be to lay down a rule of law which would be impossible for one to comply with.

The second point raised by Mr. Subramania Aiyar is that the Receiver ought to have been made a party at least on 20th December, 1921. But once it is held that the suit was rightly filed on 26th October, 1921 and the bringing in of the Official Receiver is merely a matter of compliance with such orders as the Court may pass under S. 29 of the Insolvency Act, the fact that he might have been brought in December, 1921 and not in April, 1922 makes no difference. There is no rule of limitation governing the application to bring the Official Receiver as

1. (1920) I L R 42 A 433. 2. (1920) 16 L W 43.

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a party. Directions of Courts under S. 29 are the only matters that can govern the procedure in regard to the bringing in of the Official Receiver as a party.

The third contention of Mr. Subramania Aiyar is that as the *interim* order was passed on 17th January, 1921 the properties vested in the Official Receiver on that date and as the suit was filed 9 months after that date, the Official Receiver could have been made a party. But the order of the appointment of the *interim* Receiver has not got the same effect as the vesting order or the order of adjudication. The effect of the appointment of an *interim* Receiver is that he will have such of the powers conferrable on a Receiver appointed under the Code of Civil Procedure, 1908, as the Court may direct. Ex. VI, which is the order appointing the Official Receiver as the *interim* Receiver, shows that he was appointed as *interim* Receiver only for the purpose of realisation of the assets of the insolvent, to collect the rents and debts due to the insolvent and for similar other purposes. But the properties themselves do not vest in the Official Receiver by reason of such an *interim* order. Therefore the contention of Mr. Subramania Aiyar fails.

The result is the decision of the Lower Appellate Court is right and the second appeal is dismissed with costs.

N. S. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI.

Kumarappa Chettiar and others ... *Petitioners* in both (Petitioners)*

v.

Podisal and another ... *Respondents.*

Kumarappa Chettiar v. Podisal.

Madras Estates Land Act, Ss 73 to 75—Appraisement proceeding—Jurisdiction to inquire into—Denial by tenants of landlord's right to collect melwaram not per se *sufficient to oust—S. 205—Powers of Collector under—Limits of.*

A mere denial by the tenants of the landlord's right to collect melwaram will not oust the jurisdiction under Ss. 73 to 75 of the Estates Land Act of the Deputy Collector to make an inquiry.

The powers of the Collector under S. 205 of the Estates Land Act are limited and he cannot go into the weight of the evidence or decide the matter as if it was an appeal on the facts to him. He can interfere if he considers that there has been a miscarriage of justice.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise

*C R P Nos. 1364 and 1366 of 1925. 11th March, 1927.

the decretal orders of the Court of the District Collector of Tanjore in R. P. Nos. 42 and 44 of 1925 preferred against the decretal orders of the Court of the Deputy Collector of Pattukottai Division in Miscellaneous Applications Nos. 62 and 64 of 1925 respectively.

B. Sitarama Rao for petitioners.

S. Muthiah Mudaliar for respondents.

The Court delivered the following

JUDGMENT :—This Civil Revision Petition arises out of an order passed by the Collector under S. 205 of the Madras Estates Land Act on a revision filed before him from an appraisement proceeding by the Deputy Collector under Ss. 74 and 75 of the Act. The points for decision before the Collector were, first of all, whether the application on the facts found by the Deputy Collector would lie under S. 74 of the Act, and whether the applicant was the person entitled to ask for the appraisement assuming that the facts were in existence which would entitle the landlord to invoke S. 74. The Deputy Collector heard the evidence and allowed the application of the petitioner here. The Collector in revision was of opinion that the applicant was not entitled to file the application but he set aside the order of the Deputy Collector in respect of certain of the lands referred to in the order on the ground that the tenants denied that the landlord had any right to collect *melwaram* and that this mere denial puts an end to the power of the Deputy Collector to act under S. 73 of the Estates Land Act. I think the Collector is clearly wrong in the view that a mere denial by the tenants ousts the jurisdiction under Ss. 73, 74 and 75 of the Deputy Collector to make an enquiry. This part of the order is not supported by the respondent. The powers of the Collector under S. 205 are limited and he cannot go into the weight of the evidence or decide the matter as if it was an appeal on the facts to him. S. 205 gives him power to act only if the Revenue Officer appears to have exercised a jurisdiction not vested in him by law or to have failed to exercise a jurisdiction so vested or while acting in the exercise of his jurisdiction to have contravened some express provisions of law affecting the decision on the merits or where such a contravention has produced serious miscarriage of justice. I think it is clear that before the Deputy Collector can act it must be shown that the petitioner was entitled to apply for appraisement and if on the facts proved before him such a right

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is not proved the obvious course on revision would be to set aside the order as being one passed by the Deputy Collector without jurisdiction.

Mr. Muthiah Mudaliar argues that the right of the petitioner has not been proved on the evidence on record. I think that this petition ought to go back to the Collector for the purpose of ascertaining whether in his view the petitioner has proved his right to come before the Deputy Collector for appraisement. If there is no evidence to support his right the order on the revision petition of the Collector would be to allow the revision if he considers that there has been a miscarriage of justice. If the petitioner is found to be entitled to apply for appraisement it is clear that a mere denial by the tenants would not affect his rights. I set aside the order of the Collector and remand the petition to him for disposal in the light of the above observations. It is also contended that the Collector has not dealt with the other grounds raised before him in revision and the Collector will decide all the points raised. Costs will abide and follow the result.

A. S. V. *Order set aside: Petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER.

The Secretary of State for India in Council ... ... *Appellant** (*Defendant*)

v.

P. A. Madurai Chetty and another ... ... *Respondents* (*Plaintiff and nil*).

Secretary of State for India v. Madurai Chetty.

Salt Act—S 85, Rules framed under—Duty payable by licensee—Enhancement of, between date of order for removal and that of actual removal—Licensee's liability for enhanced duty—Deficiency if recoverable under S. 84 of Act

The respondent, a licensee of salt, applied on 27th February, 1923 for permission to remove the salt, paid the duty at the rate then current and got orders for delivery. He did not remove the salt till 1st March, by which time, however, the duty had been doubled.

Held, that under the Rule framed under S. 85 of the Salt Act the respondent was bound to pay the enhanced duty, notwithstanding that the delay in the removal was due to the restrictions imposed by the Commissioner on the hours of removal.

Held further, that the deficient duty was recoverable under S. 84 of the Act.

C. C. C. A. No. 14 of 1918 dissented from

*C C C A No. 57 of 1925. 5th January, 1927.

Secretary of State for India v. Madurai Chetty.

Appeal against the decree of the City Civil Court, Madras, in O. S. No. 235 of 1924.

The Government Pleader for appellant.

V. S. Narasimhachari for respondents.

The Court delivered the following

JUDGMENT :—The appellant in this case is the Secretary of State for India. The respondent was the transferee of 800 maunds of salt belonging to a licensee named Chengalraya Chetty. On 27th February, 1923, he applied for permission to remove the salt, paid the duty of Rs. 1,000 at the rate then current of Rs. 1-4-0 per maund and got orders for delivery. The salt was, however, not removed till 1st March, by which time the duty had been doubled. By a rule framed under S. 85 of the Salt Act, the duty payable is that in force on the date of removal. The respondent was called upon to pay the deficient duty of Rs. 1,000 but refused to do so. Coercive steps were taken against him under S. 84 of the Act, whereupon he paid. He then sued to recover the sum of Rs. 1,000 *plus* interest and obtained a decree from the City Civil Court.

As I understand the Lower Court's reasoning, it proceeded on some ground of supposed hardship of which the respondent had been the innocent victim. For reasons which do not appear and as to which it is idle to speculate, the Commissioner issued instructions on 23rd February that the hours of removal should be restricted to four a day. The Lower Court thought that but for the restriction, the respondent could have removed his salt on 27th or 28th February, and that he should not be penalised for a delay for which he was not responsible. That seems to me to be entirely beside the point. A perfectly valid rule had been framed under S. 85 of the Act, laying down that the duty payable is that in force at the time of removal. The respondent cannot escape from the operation of that rule by alleging that, but for certain restrictions, he might have removed the salt earlier. The restrictions were not designed to prejudice him in particular. They were imposed, presumably, for general administrative purposes by an authority competent to impose them. They may have caused a delay for which the respondent has to suffer, but the rule is there and he cannot avoid its effect. The Lower Court relied on the ruling reported in *Brito* v. *The Secretary of State for India in Council* (1). It does not appear from the facts of that case whether there

1. (1881) I L R 6 B 251.

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was a rule in force in Bombay similar to the one with which we are now dealing. I agree that the respondent, when he paid the old rate of duty, acquired a right to remove the salt, but if the rate was enhanced before removal, the rule is clear that he had to pay at the enhanced rate. I find on the first issue that the respondent was bound to pay duty at the enhanced rate.

The Lower Court was further of opinion that the authorities were not entitled to resort to coercive processes against the respondent under S. 84 of the Act. It relied on an unreported decision of a Bench of this Court in C. C. C. A. No. 14 of 1918, which held that the charges referred to in S. 43 of the Act carried no personal liability and could not be recovered under 84. With great respect I am unable to follow that decision. S. 43 is statedly subject to rules framed under S. 85. Rule 81 imposes on the licensee (and consequently on his transferee) the liability to pay the duty in order to get an order for delivery. If the duty is not paid, it is due from him and recoverable, in the first instance, from any money owing to him by the Commissioner or from any salt belonging to him that may not have been removed. Failing recovery in either of those ways, it is recoverable as an arrear of land revenue. I find that the deficient duty was recoverable from the respondent under S. 84 of the Act.

The appeal is allowed, and the suit is dismissed with costs throughout.

A. S. V. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR VICTOR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE SRINIVASA AIYANGAR.

Bhavirisetti Lakshminarasimham ... *Appellant** (*Petitioner*)

v.

Vetcha Lakshminarasimham and others ... *Respondents* (*Respondents*).

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Bhavirisetti Lakshminarasimham v. Vetcha Lakshminarasimham.

Civil Procedure Code, O 21, R. 53—Attachment of decree passed by another Court—When becomes complete—Notice to judgment-debtor under cl. 6—If necessary to make the attachment come into force.

The notice under O. 21, R. 53 (6) of the Civil Procedure Code to the judgment-debtor of the attached decree is not necessary before the attachment of the decree under R. 53 comes into force.

*A A A O No. 102 of 1924. 5th January, 1927.

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Kuppusami Aiyar v *Kuppusami Aiyar*, (1918) 24 M L T 495 referred to.

Nagu Reddiar v. *Veerappa Mudaliar*, (1920) 13 L W 34 distinguished.

Appeal against the Order of the Court of the Subordinate Judge of Guntur, dated the 29th January, 1924 in Appeal No. 3 of 1924 preferred against the Order of the Court of the Additional District Munsif of Guntur, dated the 3rd February, 1923 in E. P. No. 62 of 1922 in O. S. No. 327 of 1921.

B. Somayya for appellant,

Ch. Raghava Rao for 3rd and 4th respondents.

The Court (Wallace and Madhavan Nair, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—The question for decision in this appeal is simple, but the answer is difficult. The question is, when does an attachment under O. 21, R. 53, Civil Procedure Code, by a Court of a decree passed by another Court become operative and bring the provisions of S. 64, Civil Procedure Code, into force? R. 53 is so loosely drafted that we can see no less than six possible answers to this question: (1) when the attaching Court signs the notice under R. 53(1) (*b*); (2) when it actually issues that notice; (3) when that notice reaches the Court which passed the decree; (4) when the notice prescribed by sub-section (6) to be given to the judgment-debtor is signed; (5) when that notice is issued, and [illegible] hen that notice is served on the judgment-debtor or given to [illegible]. Answers (1) and (4) may be dismissed at once. It has never been held by this Court and would be contrary to common sense to hold, that a mere signing without promulgation or issue of the order or notice can operate to effect an attachment. Answer No. (2) also seems opposed to common sense. If the Court which passed the decree is to be prohibited from doing something, the natural commencement of the prohibition would be the time when the prohibition reaches it and it is aware of the prohibition. Until it is aware of the prohibition there is no reason why it should stay its hand. As to No. (3), the main question is whether the rule contemplates that the order of attachment does not become operative until the notice spoken of in sub-section (6) should also have gone out, that is, whether the attachment is effected by the receipt of a notice under sub-section (1) (*b*) by the Court which passed the decree *plus* the giving of a notice under sub-section (6) to the judgment-debtor. If the answer is "no" then answers Nos. (5) and (6) do not arise. If the answer is "yes," then they have to

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be further considered. We shall, therefore, direct our attention first to this point.

The language of the rule is, the attachment shall be made by the issue to the Court which passed the attached decree "of a notice by the Court which passed the decree sought to be executed," and textually implies that when that notice is issued, (or is, as we hold, received by the Court which passed the attached decree) the attachment is "made," that is, takes effect. But there is a good deal to be said for the argument that the rule has to be read as a whole, and that when the rule also prescribes other necessary proceedings to be carried out, these also have to be carried out before the attachment takes effect. Rule 54, for example, says that the attachment shall be made by an order prohibiting the judgment-debtor from doing so and so, and it also goes on to say that that order "shall be proclaimed," and it has been held, and, if we may say so with respect, rightly held, by this Court that until the order has been so proclaimed the attachment does not take effect (*Ramanayakudu* v. *Boya Pedda Basappa* (1)] which has been approved in a Full Bench ruling in *Sinnappan* v. *Arunachalam Pillai* (2). In the Division Bench ruling the learned Judges say that "We think that, in order to make the order prohibitive, the person prohibited must have the opportunity afforded by the publication mentioned in clause 2 of rule 54 of knowing that he is so prohibited."—[*Note.*—We have looked up the original record and find that the word "application" as printed is a misprint for "publication"]. So that, before the attachment under S. 54 becomes operative, the prohibition must have been brought to the notice of the person prohibited.

This principle will not, however, carry us further than this, that when it is laid down that an attachmeent has to be made by a prohibitory order, that attachment takes effect from the time when that order is brought to the notice of the person prohibited. Under R. 53 the attachment is made by a prohibitory order to the Court which passed the decree and it would not come into effect therefore until that order has reached the Court. But the rule does not go further and say that the notice to the judgment-debtor under sub-section (6) is a part of the machinery by which the attachment is to be made. That sub-section speaks of a separate notice for which a special

1. (1919) I L R 42 M 565 : 36 M L J 284.
2. (1919) I L R 42 M 844 : 37 M L J 375.

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application *ad hoc.* is to be made and which is not said to be requisite before the attachment is made. A point worth noting is that though sub-section (6) was a new introduction into the Code of 1908 no *form* of notice under it has been added to the forms at the end of the first schedule. The essence of the attachment under R. 53 appears to be the prohibitory order to the Court which passed the decree, and not any notice either to the decree-holder or to the judgment-debtor of the attached decree, and the Court which passed the decree, on receiving the prohibitory order, is bound to refuse to execute the decree for the benefit of the decree-holder of the attached decree. On receipt of that prohibitory order by the Court which passed the decree, the attachment takes effect, and it follows from S. 64 that then no payment made by the judgment-debtor of the attached decree to the decree-holder shall be recognised as against the claims of the attaching decree-holder under the attached decree. In this view sub-section (6) would seem to be not only superfluous but misleading, and this is a strong argument against it.

The language of the sub-section certainly warrants a contention that if payments and adjustments of the attached decree made by the judgment-debtor *after* receipt of the notice under it shall not be recognized by any Court, then such payments or adjustments made *before* the receipt of the notice should be recognized. But such an interpretation would obviously conflict with S. 64, if the attachment is effected as soon as the notice under sub-section (1) is served on the Court which passed the decree. It may be that sub-section (6), which is a new sub-section, was introduced with reference to R. 2 of O. 21. See *Gopal Nanashet* v. *Joharimal* and *Dada Balshet* v. *Joharimal* (3). If the sub-section were not there, then the judgment-debtor of an attached decree making a payment at any time under the attached decree could claim that that payment should be recorded and certified under R. 2 and therefore should be recognized by the Court.

On the other hand, to hold that the attachment has no effect until the notice in sub-section (6) had been served on the judgment-debtor of the attached decree, would imply, first, that under R. 53, cl. 2, the Court which passed the decree could go on executing it for the benefit of the attaching decree-holder although there was no attachment in force, and secondly, that

3. (1891) I L R 16 B 522.

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the Court which passed the decree, which had received a prohibitory order that it was not to allow execution of the decree, would nevertheless be bound to execute it unless and until a notice under sub-section (6) had been given to the judgment-debtor. These are absurd positions for the Court to be put in. It is argued that if the judgment-debtor of the attached decree comes to the Court which passed the decree and endeavours to make a payment under the decree to his own decree-holder the Court itself would bring the attachment to his notice, and therefore he would have had notice of it. But that would not be a compliance with sub-section (6) because the notice there has to be one made on an application by the attaching decree-holder. Further, sub-section (6) does not say that any notice is to go to the decree-holder of the attached decree, and if he applies to execute his decree, the Court, which *ex hypothesi* has received an order prohibiting if from executing, nevertheless, would have to execute it, unless and until it is informed that the attaching decree-holder has taken out in the Court making the attachment the notice under sub-section (6). That again seems an absurd position. Again the decree-holder and the judgment-debtor of the attached decree might go on adjusting the decree out of Court. That decree-holder hearing that there has been an attachment and therefore that he is not going to get any benefit for himself from the decree might even give up his claims under the decree out of Court and declare the decree satisfied, although there was a prohibitory order to the Court which passed the decree directing that the decree shall not be executed. On the other hand, it seems anomalous that a prohibitory order known *ex hypothesi* only to the Court which passed the decree and not to the parties to that decree should operate to bar payments or adjustments of the decree even out of Court, and it has to be admitted that in most other attachments under O. 21 some form of information of the prohibitory order to the party prohibited is provided for.

Of reported rulings directly on the point there are very few in this Court: in fact, we have traced only two and these are directly at variance. In *Kuppusami Aiyar* v. *Kuppusami Aiyar* (4), a Bench of this Court has held that a notice under sub-section (6) is not necessary for the effectual completion of the attachment. In *Nagu Reddiar* v. *Veerappa Mudaliar* (5),

4. (1918) 24 M L T 495. 5. (1920) 13 L W 34.

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a single Judge deliberately refused to follow that view. We are ourselves inclined to adopt the view in *Kuppusami Aiyar* v. *Kuppusami Aiyar* (4), but recognizing that this is a point which must probably arise as an every-day occurrence in executing Courts, we think that it is necessary to refer the matter for the decision of a Full Bench. We accordingly do so, the question referred being, "Is the notice under R. 53 (6) to the judgment-debtor of the attached decree necessary before the attachment comes into force?" The Full Bench might also suggest if they think fit that R. 53 be amended so as to make it plain what it actually means. A notice to the decree-holder of the attached decree would probably meet the case better than a notice to his judgment-debtor.

B. Somayya for appellant.

Ch. Raghava Rao for 3rd and 4th respondents.

The Court expressed the following

OPINION :—The question referred to the decision of the Full Bench in this case is as follows: "Is the notice under R. 53 (6) to the judgment-debtor of the attached decree necessary before the attachment comes into force?" The learned Judges who made the reference have also added "The Full Bench might also suggest if they think fit that R. 53 be amended so as to make it plain what it actually means. A notice to the decree-holder of the attached decree would probably meet the case better than a notice to his judgment-debtor."

The question propounded refers to R. 53 (6) of O. 21 of Schedule I, Civil Procedure Code. The learned Judges who have made the reference appear to have thought that there was a conflict of view between the decision in the case of *Kuppusami Aiyar* v. *Kuppusami Aiyar* (4) and that in *Nagu Reddiar* v. *Veerappa Mudaliar* (5). We do not understand the learned Judge in the latter case to have expressed any opinion with regard to the question of coming into force or completion of the attachment. It seems to us quite clear that that decision was based entirely on the construction of cl. 6 of R. 53 of O. 21, Civil Procedure Code. It is not however possible to agree with the view of Abdur Rahim, J., in the former case at page 497 that the words in the said clause "either through the Court or otherwise" refer to payment or adjustment and not to notice. The interpretation placed by the learned Judge on those words is opposed to all cardinal rules of

4. (1918) 24 M L T 495. 5. (1920) 13 L W 34.

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construction. We are satisfied that the provision made in R. 53 (6) is only a special case of the application of a well-known principle of justice and equity intended for the protection of parties to a *bona fide* transaction without notice. Cl. 6 above referred to has, in our judgment, nothing whatever to do with the completion or non-completion of the attachment or its coming into force.

Mr. Somayya for the appellant contended before us that cl. 6 should be confined to the invalidation of payments and adjustments made by the judgment-debtor under the decree attached after receipt by him of the notice and cannot be held by implication to validate such payments or adjustments made before the receipt of such notice. It is impossible to accede to such a contention. Indeed Mr. Somayya himself shrank from saying that actual payments in cash were not to be protected, but contended that adjustments stood on a different footing. We see no logic in this; provided they were made in good faith and without notice, payments and adjustments must stand or fall together. The necessary implication of the provision in cl. 6 of R. 53 is that it is only after the judgment-debtor under the attached decree receives either through Court or otherwise notice of the order of attachment that any payment or adjustment made by him to his decree-holder will not be recognised by the Court and that therefore, if such judgment-debtor should in ignorance of such attachment have made any payment or adjustment, it should be regarded as a payment or adjustment properly made under the decree to the rightful person. No question can in such a case arise with regard to any payments not really made or any adjustments not *bona fide* effected. We are inclined to agree with the view taken by Abdur Rahim, J., in *Kuppusami Aiyar* v. *Kuppusami Aiyar* (4), that notice to the judgment-debtor of the attached decree under R. 53 (6) is not necessary for the purpose of completing the attachment and that the attachment is complete before any such notice is issued. R. 53 (1) provides that the attachment of a decree shall be made, if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice in the terms thereinafter referred to. There is no room for any doubt or ambiguity in the language employed. The expression "by the issue to such other Court of a notice" is apt and sufficient to indicate that for the making of the attachment the notice should be to

4. (1918) 24 M L T 495.

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the Court which passed the attached decree. It cannot of course be contended that the moment a mere order of attachment is passed by the Court seeking execution the attachment becomes complete. The Code undoubtedly contemplates in all cases of attachment some kind of service or posting or publication or proclamation for the purpose of effectuating an attachment and in the case of the attachment of a decree the form of effectuation provided is the service of notice on the Court which passed the attached decree. The decision of the Full Bench in *Sinnappan* v. *Arunachalam Pillai* (6), proceeded on a construction of R. 54 of O. 21 and only held that the proclamation prescribed in clause (2) of the rule was the mode in which the attachment ordered should be effected. The conclusion was based on the collocation of the clauses in the rule and the necessity in every case of the order made being served or promulgated. With reference to R. 53 we are unable to regard the provision in cl. 6 for notice as a pre-requisite for the completion of the attachment. But though on general principle after completion of the attachment any dealing in regard to the attached property is forbidden it does not follow that persons who act *bona fide* without notice should in no case be protected. It has been strenuously contended by the learned vakil for the appellant that S. 64, Civil Procedure Code, provides that "when an attachment has been made, ... any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment." But the rules in the First Schedule of the Procedure Code are under terms of S. 121, Civil Procedure Code, made part of the Code itself and it therefore follows that cl. 6 of R. 53 merely provides an exception to the general rule embodied in S. 64. If therefore in the present case it has been found, as it appears to have been, that the judgment-debtor of the attached decree had no notice of the order of attachment at the time when the payment and adjustment pleaded were made, then it follows that even though the attachment had already become complete and effective, the payment and adjustment should be recognized by the Court and the question whether or not the notice provided for in cl. 6 is necessary for the attachment being complete or coming into force, does not directly arise. But the question has been referred to our decision and we think that it logically follows

6. (1919) I L R 42 M 844 : 37 M L J 375 (F B).

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from what we have said that the notice to the judgment-debtor referred to in R. 53 (6) of O. 21, Civil Procedure Code, is not necessary to make the attachment come into force. In the view we have taken R. 53 (6), Civil Procedure Code, is quite plain nor do we regard it as necessary or useful to suggest the desirability, by any new rule, of providing for notice to the decree-holder of the attached decree, because to do so would only be to afford further time and opportunity for fraudulent dealings with regard to attached decrees.

N. S. *Reference answered in the negative.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT :—LORD PHILLIMORE, LORD DARLING, MR. AMEER ALI AND SIR LANCELOT SANDERSON.

Narayan Das Khettry, since deceased ... *Appellant**

v.

Jatindra Nath Roy Chowdhury and others ... *Respondents.*

P. C.

Narayan Das Khettry v. Jatindra Nath Roy Chowdhury.

Sale for revenue—House standing on the land—Acquisition—Claim to compensation monies awarded for the house—Application of maxim "quicquid plantatur solo, solo cedit"*—Definition of the word "estate"—Principles for apportionment—Bengal Act XI of* 1859*—Land Acquisition Act (I of* 1894).

Plaintiff purchased a holding sold for arrears of Government revenue under the provisions of Bengal Act XI of 1859. At the time of purchase a house stood on the land. Defendants' predecessor was the proprietor of the holding. Subsequently the land was acquired under the provisions of the Land Acquisition Act, 1894. Plaintiff claimed the compensation monies awarded for land and building. The defendants contended that the sale had not passed title to the building, and claimed the amount awarded for the house.

Held (1) that in India the maxim in English law, viz., "quicquid plantatur solo, solo cedit" has at the most only a limited application. *Thakoor Chunder Poramanick* v. *Ramdhone Bhuttacharjee,* (1866) 6 W R 228 approved; (2) that the word "estate" defined in Bengal Act VII of 1868 which is to be read with and taken as part of Bengal Act XI of 1859, must be taken to have a more limited meaning than it would have in English law, and the Government's power of sale, *prima facie,* is limited to the land; (3) that accordingly the ownership of the building did not pass to the plaintiff by reason of the revenue sale, and (4) that in order to determine the question whether the defendants were entitled to the compensation monies awarded in respect of the building, or to what, if any, portion of such money, it would be necessary

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*P C Appeal No. 41 of 1926. 21st March, 1927.

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to consider what would have been the position of the respective rights of the parties after the sale, if no acquisition had taken place under the Land Acquisition Act. *Maharaja Surja Kanta Acharjya* v. *Sarat Chandra Roy Chowdhuri,* (1914) 18 Cal. W N 1281, 1285 (P C) followed.

Case remanded for decision on apportionment.

Decree of the High Court varied.

Appeal from a decree of the Calcutta High Court varying a decree of the Subordinate Judge of 24 Parganas.

The facts are stated in the judgment reported below.

Sir George Lowndes, K. C. and *Dube* for appellant referred to Act VII of 1868, Act XI of 1859 and the General Clauses Act, 1897, S. 3 (25) and S. 4 and cited *Thakoor Chunder Poramanick* v. *Ramdhone Bhuttacharjee* (1), *Shib Doss Banerjee* v. *Bamun Doss Mookerjee* (2) and *Ramkoomar Sen* v. *Mohesh Chunder Sen* (3).

Dunne, K. C. and *Kenworthy Brown* for respondents cited *Collector of Trichinopoly* v. *Lekkamani* (4), *Maharaja Surja Kanta Acharjya* v. *Sarat Chandra Roy Chowdhuri* (5) and *Sashikanta Acharyya* v. *Sarat Chandra Rai Chaudhuri* (6).

Sir George Lowndes, K. C., replied.

21st March, 1927. The Judgment of their Lordships was delivered by

Sir Lancelot Sanderson.

Sir Lancelot Sanderson.—This is the plaintiff's appeal against the decision of a Division Bench of the High Court of Judicature at Fort William in Bengal, given on the 12th March, 1925, which reversed a judgment and decree dated the 24th August, 1922, of the learned Subordinate Judge of the 24 Parganas.

The material facts are as follows:—

Satyendra Nath Roy, who was the predecessor of the defendants, was the proprietor of the holding in question.

The holding was sold in December, 1919, under the provisions of Act XI of 1859 for arrears of the Government revenue of Rs. 2-8-1.

The plaintiff purchased the holding at the sale for the sum of Rs. 2,900. Application was made to the Divisional Commissioner by the defendants or their predecessor to have the sale set aside, but the application was refused.

On the 5th July, 1920, a sale certificate was issued to the plaintiff by the Collector of the 24 Parganas, certifying that the

1. (1866) 6 W R 228.
2. (1871) 15 W R 360.
3. (1860) 1 Sud. Ad. 637.
4. (1874) L R 1 I A 282, 306.
5. (1914) 18 C W N 1281, 1285 (P C).
6. (1921) 34 C L J 415, 421.

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plaintiff had purchased, under Act XI of 1859, the mahal, which was specified in the certificate and which was situate in the Touzi of the district of the 24 Parganas.

It appears from the copy of the certificate which is before their Lordships that it was therein stated that the purchase took effect on the 1st day of May, 1919.

At the hearing of the appeal by their Lordships there was a dispute as to the correctness of the last-mentioned date.

Walmsley, J., in his judgment referred to this date as the 1st May, 1920, while Mukherji, J., referred to it as the 1st May, 1919.

If it becomes necessary to ascertain the correct date, a reference will be necessary for that purpose.

On the 2nd August, 1920, a declaration was made under the provisions of the Land Acquisition Act, viz., Act I of 1894, in respect of the holding, and on the 11th March, 1921, the Deputy Collector made his award. The total amount of the award was Rs. 14,569 (omitting annas and pies).

The sum awarded in respect of the land and trees, and the additional compensation under S. 23 (2), was Rs. 2,181, and the amount in respect of "Structures" and the additional compensation was Rs. 12,388.

The "structures" consisted of a residential house which had been erected by Satyendra Nath Roy, and it was standing on the land at the time of the plaintiff's purchase.

The plaintiff's name had been registered under Act VII of 1876 (B. C.), and he claimed the whole amount of the compensation money, viz., Rs. 14,569. The Collector decided that it was necessary for the plaintiff to produce an order of a competent Court before the money could be paid to him.

Accordingly the plaintiff instituted the present suit, in which he claimed that his right, title and interest to the holding in question and to the whole of the compensation money should be established and declared. He prayed for a further declaration that he was entitled to withdraw the compensation money deposited in the Alipore Collectorate.

It was urged on behalf of the defendants in the Trial Court that the sale was not valid or binding on them. The learned Subordinate Judge found against the defendants on this issue, and this finding was not disputed in the High Court or on the appeal to this Board.

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Assuming the sale to be valid, it was not disputed that the plaintiff was entitled to the compensation money awarded in respect of the land and trees.

It was, however, urged on behalf of the defendants that the plaintiff had not acquired any title to the building on the land by his purchase at the above-mentioned sale, and consequently that he was not entitled to any of the compensation money awarded in respect thereof.

The learned Subordinate Judge held that the building on the land passed with the holding to the auction purchaser (*i. e.*, the plaintiff) by the revenue sale, and that the plaintiff was entitled to recover the entire compensation money.

On appeal to the High Court, the learned Judges held that the ownership of the building did not pass to the plaintiff on the above-mentioned sale, but that the defendants remained the proprietors thereof.

The learned Judges then proceeded to the consideration of the question whether the defendants were entitled to the whole of the compensation money awarded in respect of the building, and for the reasons set out in the judgments of the learned Judges they decided that the defendants were entitled to the whole amount awarded for the building, less a sum of Rs. 2,300. The sum of Rs. 2,300 was award[ed by] the learned Judges as compensation to the plaintiff at the ra[te] of Rs. 100 per month in respect of 23 months, which period was calculated from the 1st May, 1919, to the 11th March, 1921, when the Collector took possession of the premises.

From this decision the plaintiff has appealed. The first question is whether the learned Judges of the High Court were right in holding that the title to the building did not pass to the plaintiff by reason of his purchase at the revenue auction sale.

It was not disputed that if the plaintiff's case was based upon a conveyance by the late proprietor of the land, the house would pass with the land to the purchaser; but it was argued on behalf of the defendants that as the sale in question was under the Act XI of 1859 it was merely a sale by the Collector of the Government's interest.

This part of the defendants' contention is, in their Lordships' opinion, correct; for in *Maharaja Surja Kanta Acharjya* v. *Sarat Chandra Roy Chowdhuri* (5) the Judicial Committee held that on the failure of an owner to pay the Government

5. (1914) 18 C W N 1281 at 1285 (P C).

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assessment, his estate or interest in the land is forfeited or rather determined, and that by a sale held under Act XI of 1859, what was sold was not the interest of the defaulting owner, but the interest of the Crown, subject to the payment of the Government assessment.

It is therefore necessary to ascertain what was the interest of the Crown which was subject to the Government assessment.

The preamble to Act XI of 1859 recites that it is desirable, among other things, to improve the law relating to sales of land for arrears of revenue in the provinces of Bengal, Behar and Orissa.

S. 3 provides for the sale of the "estates in arrear" in the payment of revenue at public auction to the highest bidder.

There is no definition of the word "estates" in the 1859 Act, but in the Bengal Act VII of 1868, which is to be read with and taken as part of the said Act of 1859, provision is made that in that Act and the Act XI of 1859 the word "estate" means any land or share in land subject to the payment to the Government of an annual sum in respect of which the name of a proprietor is entered on the Register known as the General Register of all revenue-paying estates, or in respect of which a separate account may, in pursuance of S. 10 or S. 11 of the said Act XI of 1859, have been opened.

It was argued on behalf of the defendants that it was the land so entered on the register, and not the building on the land, which was subject to the payment of the Government revenue and which passed to the purchaser at the auction sale held under the provisions of Act XI of 1859.

The property in question lies in the 24 Parganas, outside the boundaries of Calcutta, and it was conceded that the maxim, which is found in English law, viz., *quicquid plantatur solo, solo cedit,* has at the most only a limited application in India.

The case of *Thakoor Chunder Poramanick* v. *Ramdhone Bhuttacharjee* (1), to which reference was made in the High Court's judgment, differs materially from the present case in its facts, and the decision itself is not applicable.

The following statement, however, is to be found in the judgment of the Full Bench which was delivered in 1866:—"We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law

1. (1866) 6 W R 228.

that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself."

Their Lordships, therefore, are of opinion that in construing the provisions of the above-mentioned Acts it is necessary to bear in mind the statement made by Sir Barnes Peacock in the above-mentioned case, which seems to have been accepted for many years as a correct pronouncement.

This being so, the word "estate" must be taken to have a more limited meaning than it would have in English law and the Government's power of sale for arrears of revenue *prima facie* is limited to the land, which is subject to the payment to the Government of the annual revenue, and in respect of which the proprietor is entered in the General Register of Revenue-paying Estates, and having special regard to the view held in India respecting the separation of the ownership of buildings from the ownership of the land, and to the recognition by the Courts in India that there is no rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself, their Lordships are of opinion that in order to make a house erected upon the land, as well as the land itself, subject to the Government power of sale for arrears of revenue, special words indicating the intention of the Legislature to make the building subject to sale would be necessary.

No such special words are to be found, and their Lordships are of opinion that the conclusion at which the learned Judges of the High Court arrived, viz., that the ownership of the building did not pass to the plaintiff by reason of the revenue sale, was correct, although they are not prepared to adopt all the reasons which were advanced for that conclusion.

The question then arises whether the defendants are entitled to the compensation money which was awarded in respect of the building, or to what, if any, portion of such money.

Their Lordships are not prepared to adopt the basis on which the learned Judges of the High Court acted in this respect. Their Lordships are of opinion that, in order to arrive at a decision on this part of the case, it is necessary to consider what would have been the position and the respective rights of the parties after the sale, if no acquisition had taken place under the Land Acquisition Act.

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In such a case it would be reasonable that the parties should arrive at an arrangement as to what should be done, and their Lordships therefore suggested that learned counsel appearing for the appellant and respondents should enquire whether any arrangement could be made.

Their Lordships have been informed that it has not been found possible to arrive at any arrangement or to agree upon a sum to be paid to the defendants, and their Lordships have, therefore, to deal with this part of the case.

It is difficult to lay down any principle upon which the compensation money awarded in respect of the house should be apportioned, but the position seems to their Lordships to involve certain matters which should be taken into consideration by the Court which makes the apportionment.

After the sale the plaintiff would have been the owner of the land and the defendants would have been the owners of the house.

The plaintiff would have had the right to call upon the defendants to remove the house. If the defendants did remove the house, the value to them would be small, and in the ordinary course would be no more than what has been called "demolition value," viz., the value of the materials less the cost of removal; and if the defendants did not remove the house they would lose it.

There is, however, the possibility that (if the land had not been acquired under the Land Acquisition Act) the owner of the land would not have desired or required the removal of the house, and he might have been willing to pay to the defendants, the owners of the house, more than the mere demolition value of the house.

In other words, the owner of the land would be a possible purchaser, who might be willing to give more for the house than anyone else, as he was the owner of the land.

It is also to be remembered and taken into consideration that if the defendants were called upon to remove the house they would be entitled to a reasonable time for such removal, and that during such time the plaintiff would be kept out of enjoyment of the land.

All the above-mentioned matters will have to be taken into consideration in assessing what portion of the compensation money awarded in respect of the house should be paid to the defendants.

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Their Lordships are not in a position to make the apportionment, and as the parties have not been able to agree upon an amount, it is necessary to remand the case to the learned Subordinate Judge in order that he may decide to what portion of the Rs. 12,388 the defendants are entitled, having regard to the matters which are mentioned in this judgment.

Their Lordships have been informed that the balance of the compensation money, ordered by the High Court's decree to be refunded, has not yet been refunded.

Their Lordships therefore will humbly advise His Majesty that the appeal should be allowed, that the case should be remanded to the learned Subordinate Judge for the above-mentioned purpose, and that the decree of the High Court should be varied as follows:—That it be declared that out of the total compensation money, *i.e.*, Rs. 14,569-9-6, the plaintiff is entitled to Rs. 2,181-9-2 and such further sum as the learned Subordinate Judge on remand may find due to him in respect of his share of the sum of Rs. 12,388-0-4 awarded by the Collector in respect of the house, and that the plaintiff do refund to the defendants the sum which the learned Subordinate Judge may find due to the defendants as their share of the said sum of Rs. 12,388-0-4.

In their Lordships' opinion, the plaintiff was compelled to bring the suit, and though he claimed more than he should have done, he was entitled to a substantial amount of the compensation money, and their Lordships think that the defendants should pay the plaintiff the costs incurred by him in respect of the trial in the learned Subordinate Judge's Court. With respect to the subsequent appeals to the High Court and to His Majesty in Council, the claims of both parties were in excess of their rights, and such claims were persisted in to the end. Their Lordships therefore are of opinion that the plaintiff and the defendants should bear their own costs in respect of the appeals to the High Court and to this Board.

The costs of the hearing on remand will be in the discretion of the learned Subordinate Judge.

Their Lordships will advise His Majesty accordingly.

Solicitors for appellant : *Watkins & Hunter.*

Solicitor for respondents : *Solicitor, India Office.*

H. C. *Appeal allowed: Case remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT :—LORD SINHA, LORD BLANESBURGH, LORD SALVESEN, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Balla Mal and others ... *Defendants** (*Appellants*)

v.

Ata Ullah Khan and others ... *Plaintiffs* (*Respondents*).

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Muhammadan Law—Wakf—Family settlement—Substantial dedication to charity—Mussulman Wakf Validating Act (VI of 1913)—Retrospective operation of.

The Mussulman Wakf Validating Act (VI of 1913) has no retrospective operation: *Khajeh Solehman Quadir* v. *Salimullah Bahadur,* (1922) I L R 49 Cal 820 : 49 I A 153 : 43 M L J 385 (P C) followed.

Under the Wakf Act, 1913, a wakf is not rendered invalid because it appears that the main object of the settlor was to make a settlement of his property on his family rather than to devote it to what are ordinarily understood as charitable purposes; whereas with regard to wakfs created before the passing of the Wakf Act, 1913, the test now, as formerly, is, not whether the gift to charity is substantial, but whether the properties included in the wakf have been substantially dedicated to charity? The wakf is not necessarily bad because of ancillary provisions made therein by the settlor for the maintenance of himself and his dependents. On the other hand, if the bulk of the income is settled on the line of his own descendants, and need only go to charity on failure of such line (an event which might be indefinitely postponed), and the settlor's real purpose is to make a family settlement of his property, there can be, under such circumstances, no substantial dedication of the property to charity, and the wakf would, in consequence, be invalid.

Ramanandan Chettiar v *Vava Levvai,* (1917) I L R 40 M 116 : 44 I A 21 : 32 M L J 101 (P C), *Mujib-un-Nissa* v. *Abdur Rahim,* (1900) I L R 23 All 233: 28 I A 15: 11 M L J 58 (P C) and *Mahomed Ahsanullah Chowdhry* v. *Amarchand Kundu,* (1890) I L R 17 Cal 498 : 17 I A 28 (P C) followed.

Judgment of the High Court reversed.

Appeal (No. 21 of 1926) from a judgment and decree of the High Court, Lahore, dated 24th July, 1923, affirming a decree of the Sub-Judge, First Class, Amritsar, dated 4th February, 1918.

All the material facts, the arguments of counsel, and the cases cited are set out in their Lordships' judgment.

The only question argued before their Lordships was as to the validity of the wakf in suit. The judgment of the High Court (Harrison and Zafar Ali, JJ.) on this point was as

*P. C. Appeal No. 21 of 1926. 23rd June, 1927.

follows:—"It is stated that the wakf was mainly for the benefit of the waqif and his descendants and that the gift to charity was illusory, and on these allegations it is contended by a reference to certain decisions of the Privy Council, which had the force of law at the time the settlement was made, that the wakf is invalid. This contention . . . is not borne out by the terms of the wakfnama in question. . . . The above provisions (of the wakfnama) indicate a genuine intention on the part of the waqif to dedicate his property for the benefit of the poor and the needy and others entitled to receive charity. Almost the whole of the income from the estate was to be paid in charity after the death of the beneficiaries stated in the deed and therefore the wakf was intended to become entirely public at no distant time. Though the property was dedicated to avoid its falling into the hands of a profligate son, the dedication is all the same valid. Some of the beneficiaries have already died and the mutawalli is entitled to an allowance of Rs. 240 per annum only which is by way of remuneration for services as mutawalli. It cannot, therefore, be said that the gift to charity was not substantial or was illusory. This being so the wakf was valid and must be enforced."

The defendants' application for leave to appeal to the Privy Council came up for hearing before Campbell and Zafar Ali, JJ., and the learned Judges having differed as to whether there was a "substantial question of law" within the meaning of S. 110, Civil Procedure Code, 1908, the opinion of the Senior Judge (Mr. Justice Campbell) prevailed under cl. 26 of the Letters Patent, Lahore, and leave to appeal was duly granted.

Mr. Justice Zafar Ali, in refusing leave to appeal, made the following observations, to which reference is made in the concluding portion of the judgment of the Judicial Committee: "These clauses (of the wakfnama) indicate that the object of the dedication was not aggrandizement of the family of the grantor; but the reverse of it. The grantor had a son and a daughter who were his lawful heirs but he gave them reasonable maintenance allowance only, and at the same time fixed allowances for certain needy widows, orphans, etc. The immediate gift to charity was Rs. 199-6-0 six monthly which was more than one-fourth of the entire six monthly income which was Rs. 779. The entire income was to be devoted to charity after the death of all the beneficiaries mentioned in the wakfnama. There was no settlement on the descendants of the

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grantor from generation to generation and the immediate gift to charity was substantial, and the time of ultimate application of the entire income to charity was not remote.... The allegation that the dedication was made for the aggrandizement of the family of the grantor and that the gift to charity was illusory and small was repudiated by the terms of the wakfnama itself. It was not shown to us that there could be two interpretations of the wakfnama . . . From the judgments of their Lordships of the Privy Council laying down what is and what is not a valid wakf Mulla has formulated a proposition which figures as Art. 159 in his Principles of Muhammadan Law and runs as below:—"To constitute a valid wakf it was not necessary, even before the Wakf Act, that the property should be solely dedicated to religious, pious or charitable uses. A valid wakf could be created, even before the said Act, for the maintenance and support of the settlor's family, children or descendants, provided that:—

"(a) there was an ultimate gift of the whole property to charity, that is to say, the ultimate benefit was reserved for the poor or for any other religious, pious or charitable purpose; and

(b) the gift to charity was substantial.

"But if there was no ultimate gift to charity, or there was such a gift but it was illusory, that is, it was small in amount, or was too remote, the provision for the settlor's family was held to be invalid."

"If our findings should stand the wakf is valid according to the above rule, and therefore the question of the validity of the wakf, though one of law, is not substantial"

The relevant provisions of the wakfnama are set out in their Lordships' judgment.

Lowndes, K. C. and *Dube* for appellants.

De Gruyther, K. C. and *Parikh* for respondents.

23rd June, 1927. The Judgment of their Lordships was delivered by

Sir John Wallis.

SIR JOHN WALLIS :—On the 16th March, 1907, the late Mian Muhammad Bakhsh executed a wakfnama or a deed of wakf, by which he purported to dedicate all his remaining properties to charity subject to certain provisions for his own maintenance and the maintenance of the people who had claims on him. He died within the year, on the 15th January, 1908, and thereupon his son Nasir-ud-Din took possession of the properties, successfully opposed the application for mutation of names made on behalf of the present plaintiff, who was then a minor, as mutawalli of the wakf, and remained in possession

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until his death in July, 1913. In the following year, the house property included in the wakfnama was attached in execution by one of his creditors, and the plaintiff's objections as mutawalli to the attachment having been disallowed, he filed the present suit by his next friend to establish the rights of wakf.

The Subordinate Judge at Amritsar and the High Court at Lahore both decided in his favour, and the defendants, who represent the attaching creditors, then obtained leave to prefer the present appeal to His Majesty in Council. The only question argued before their Lordships was whether under the wakfnama the properties of the settlor were validly dedicated to charitable purposes, and it was admitted that, if the wakfnama had been executed subsequently to the passing of the Mussulman Wakf Validating Act, 1913, it would not have been open to objection. It has, however, been ruled by the Board in *Khajeh Solehman Quadir* v. *Nawab Sir Salimullah Bahadur* (1) that the Act has no retrospective operation, and it therefore becomes necessary to examine the provisions of the deed in the light of the decisions of the Board as to wakfs which were unaffected by the Act. Under the Act a wakf is not rendered invalid because it appears that the main object of the settlor was to make a settlement of his property on his family rather than to devote it to what are ordinarily understood as charitable purposes, whereas, with regard to wakfs created before the passing of the Act, the test still is, as laid down by the Board in *Mahomed Ahsanullah Chowdhry* v. *Amarchand Kundu* (2), *Mujib-un-Nissa* v. *Abdur Rahim* (3), *Ramanandan Chettiar* v. *Vava Levvai* (4) and *Khajeh Solehman Quadir* v. *Nawab Sir Salimullah Bahadur* (5), was there a substantial dedication of the properties included in the wakf to charitable purposes? The test may sometimes be difficult of application, and in applying it the Courts, especially since the passing of the Act, will not be disposed to construe the provisions of the deed too strictly; but still the question must remain whether the properties included in the wakf have been substantially dedicated to charity, or whether they have been put into wakf by the settlor with the real object of effecting some non-charitable purpose

1. (1922) I L R 49 C 820 : 49 I A 153 . 43 M L J 385 (P C).
2. (1890) I L R 17 C 498 : 17 I A 28 (P C).
3. (1900) I L R 23 A 233 : 28 I A 15 : 11 M L J 58 (P C).
4. (1917) I L R 40 M 116 : 44 I A 21 : 32 M L J 101 (P C).
5. (1922) L R 49 I A 153 at 165 : 43 M L J 385 (P C).

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such as, for instance, that of making a family settlement of his property which would otherwise be invalid as opposed to the Muhammadan law of succession.

In the present case Mian Muhammad Bakhsh had already made a charitable disposition, in accordance with his means, by the creation of an earlier wakf, which is mentioned in the deed; and it appears fairly clear that it was because Nasir-ud-Din, his only son, was a man of bad character, that he decided to put the rest of his property into wakf. This he was at full liberty to do, provided that he devoted it substantially to charity. Further, seeing that he was putting all his remaining property into wakf, it necessarily followed that he must be at liberty to make some provision for the maintenance of himself and of those who were dependent on him for the term of their lives, and such provisions would be in no way inconsistent with a substantial dedication to charity. On the other hand, if it should appear that the bulk of the income was settled on the line of his own descendants, and need only go to charity on failure of such line, an event which might be indefinitely postponed, then the fair inference might be that his object was to make a settlement on his family which would not otherwise have been possible, and that property settled on such terms could not properly be said to be substantially dedicated to charity.

Lastly, in considering this question regard must be had to the provisions themselves rather than to the language in which they are expressed, because even where the intention was not to make a substantial dedication to charity, the object of the draftsman would be to make it appear as far as possible that it was so.

With these observations their Lordships will proceed to examine the provisions of the deed, of which the material terms were as follows:—

"I, Muhammad Bakhsh, son of the late Mian Saudagar of Nurpur, Caste Gill, resident of Amritsar, Katra Ghanayan, do hereby declare as follows:—

"The immoveable estate, mentioned below, is exclusively owned, acquired, built and founded by me without the partnership of anybody else and the same is in my proprietary possession. I follow the Muhammadan Law. . . . . .

"Since with the object of earning reward in the next world as well as in this world I have for a long time been maintaining the poor, the needy, the servitors at the Mosque, students receiving religious education, widows, revered Sayeds, and orphans, in general, and *the under-mentioned*

persons (who are my kith and kin), in particular, thinking the same to be a good deed, and I have for a long time been cherishing the idea that the said good work should continue even after my death and that the said persons should be looked after and maintained as before even after my death, as I have been looking after and maintaining them during my lifetime. Therefore I, in order to complete and accomplish the said object, have hereby, of my own accord and free will while in the enjoyment of my right senses and sound health and without the inducement of any other person, made the entire aforesaid property wakf from to-day, and giving up my proprietary rights *in toto* I agree.

". . . The entire income from the said property (after it has been deposited with the Mutwalli for the time being, and after the expenses, in connection with the Government demands, pay of the servants engaged for the above-mentioned wakf property, repairs, and other expenses which may be necessary for the said property, and also the expenses in connection with the disputes over the said property have been deducted therefrom) shall, through the Mutwalli, be divided half-yearly at the time of Kharif and Rabi harvests amongst the following persons:—

		Rs.
"1.	The poor, the needy, the Sayeds, servitors at the Mosque, students receiving religious education, widows, orphans, without distinction of name and place of residence ...	73
"2.	I, who make the property wakf, for my own maintenance	250
"3.	Nasir-ud-Din, my son	120
"4.	Musammat Sardar Begum, wife of my son, so long as she remains abad with my son as his wife	120
	If my son divorce her and she, even then, lives with me, obediently to me, and leading a life of chastity, and acts in accordance with my directions, she would get ...	60
"5.	Musammat Iqbal Bibi, wife of Abdul Ahad, and Abdul Ahad, Kureshi, and their direct lineal descendants	60
"6.	Ghulam Hassan, son of Azim Bakhsh, and Musammat Sahibo, widow of Azim Bakhsh, deceased	60
"7.	Musammat Rabia, daughter of Nabi Bakhsh, my brother-in-law (wife's brother)	60
"8.	Musammat Ghulam Fatima, wife of Muhammad Sultan ...	24
"9.	Musammat Azizan, daughter of Ghasita, my mother's sister's daughter	12

"10. In case the income from the estate after deduction of the aforesaid expenses is not so sufficient as may be divided amongst the persons mentioned in paragraphs Nos. 2 to 9 according to their respective fixed shares, the fixed amount of each one's share shall be decreased proportionately.

"11. In case the income from the estate, after deduction of the expenses, and after setting apart the stipend of each of the aforesaid persons, exceeds, the surplus amount shall be given to the Muhammadan Schools alone mentioned in paragraph No. 1 as desired by the Mutwalli.

"12. In the event of the death of any of the persons mentioned in paragraphs Nos. 2 to 9, the money allotted to his (or her) share shall be given proportionately to the other persons who may be alive or to some of them or to any one of them whom the Mutwalli thinks it proper to give,

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or the Mutwalli himself, according to his choice, shall give as much of it to the persons mentioned in paragraph No 1 as he thinks proper.

*　　*　　*　　*　　*

"15. The Mutwalli for the time being shall continuously receive Rs. 120 out of the income half-yearly as compensation for his services rendered in connection for his supervision and management of the said property made wakf. The said amount shall also be considered as forming part of the expenses in connection with the said property.

*　　*　　*　　*　　*

"19. The sums which have been allotted as stipends to the persons mentioned in paragraphs Nos. 6 to 9 have been allotted in the name of God to earn reward simply on the understanding that they, being helpless widows, orphans and needy, cannot maintain themselves, but that they stand in need of support. For this reason the entire amount to be given in the name of God, shown in paragraphs No. I and Nos. 6 to 9, shall be considered to be Rs. 199 in all for each half-year in addition to the amount which shall be given under paragraph No. 12.

*　　*　　*　　*　　*

"21. If none of the persons mentioned in paragraphs Nos. 2 to 9 remains alive, all the sums allotted to them shall, in the name of God, be wholly and solely spent for the poor, the orphans, the needy, Sayeds, servitors at Mosques, students receiving religious education, widows and for other lawful charitable purposes.

"22. I will remain Mutwalli of the said estate till my lifetime. After my death, only that person shall be the Mutwalli whom I appoint as such by virtue of a written will bearing my signature. In the event of my not appointing any Mutwalli by virtue of a written will signed by me, the male member of my family, who will be fit, honest and debtless, and is of good character, shall be the Mutwalli. After the appointment of the said Mutwalli, if my son, Nasir-ud-Din, bears a good character and is debtless, and lets Musammat Sardar Begum live in his house lovingly and peacefully, then, under such circumstances, after a period of three years the person named above can be Mutwalli of the property made wakf. After Nasir-ud-Din, his direct male lineal descendants can be successively appointed Mutwallis and can, in my place, be entitled to get my whole maintenance allowance. In case there is no male descendants from the line of Nasir-ud-Din, Dear Ata Ullah Khan, son of Raja Allah Dad Khan, shall be the Mutwalli and shall be entitled to get the said maintenance allowance. When my line of descent or that of my brother, Ghulam Rasul, becomes extinct, the then Anjuman Islamia Amritsar can be the Mutwalli of the property made wakf. But so long as my line of descent and that of my brother, Ghulam Rasul (no matter if there remains only one person alive), do not become extinct, the said Anjuman shall, in no way, interfere in the trust of the said property.

*　　*　　*　　*　　*

"24. I, as Mutwalli and as the person making the property wakf, shall, till my lifetime, reside in the Haveli, made wakf, situate in Amritsar,

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Katra Ghanayan. After me, Nasir-ud-Din, my son, with his wife and children, and Ghulam Hassan with his family, and Musammat Sahibo, mother of Ghulam Hassan, shall reside in the said Haveli till their lifetime."

The first thing to be observed about these provisions is that out of the annual expenditure of Rs. 1,558, provided for in paragraphs 1 to 9, Rs. 146 are applied for purely charitable purposes, Rs. 1,100 for the support of the settlor and his family and Rs. 312 for the support of the dependants mentioned in paragraphs 6 to 9. If the Rs. 146 devoted to charity were necessarily to be increased as the life annuities fell in, there could, in their Lordships' opinion, be no question as to the validity of the wakf. Unfortunately, this is not the scheme of the deed. Under paragraph 12, as the annuities fall in, the money allotted for them is to be divided by the mutawalli proportionately among the surviving annuitants, or be given in his discretion to some or one of them, or he is to give as much as he thinks proper to the persons mentioned in article 1, that is to say, for purely charitable purposes.

Further, it is to be observed that even this provision is not applied unconditionally to the amount of Rs. 500 reserved for his own maintenance. In paragraph 22, which confers the office of mutawalli, after his own death, conditionally on his son, and failing this, on his son's descendants and afterwards on his male agnates, and on failure of that line on the Anjuman at Amritsar, he provides that while the office is held by his descendants or agnates, they are to have the annuity of Rs. 500 reserved for his own maintenance in addition to the mutawalli's salary of Rs. 240, provided for in paragraph 12.

Paragraph 24 also confers upon his son with his wife and children and upon some of the dependants mentioned in paragraphs 6 to 9 a right to reside in the family house for life.

The result is, that so long as there are agnates of the settlor in whom the office of mutawalli can vest, the mutawalli is to get an amount of Rs. 500 in addition to his salary of Rs. 240 as mutawalli, and the mutawalli is also to pay the descendants of the settlor's daughter, so long as there are any, annually Rs. 120 and so much of the remaining lapsed balance as he chooses. He is not under any obligation to spend any of this sum for charity, though it is in his discretion to do so. In these circumstances, it seems difficult to say that the properties have been substantially dedicated to charity. Here it is necessary to observe that the law as laid down by the Board is, that

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the properties must be substantially dedicated to charity, not, as one of the learned Judges of the High Court has observed in passing orders on the application for leave to appeal, that the gift to charity should be substantial. It appears to their Lordships that the wakf in question fails to satisfy this test, and they will accordingly humbly advise His Majesty that the appeal be allowed and the suit dismissed with costs throughout.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondents : *T. L. Wilson & Co.*

K. J. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER.

Palepu Narayanamurthi ... *Petitioner* (Plaintiff)*

v.

Komali Chandrayya ... *Respondent (1st defendant).*

Narayanamurthi v. Chandrayya.

Contribution—Suit for—Decree joint satisfied by one of defendants—Suit by him for contribution against his co-defendant—Illegality of decree debt—Defence based upon—Maintainability.

A decree was obtained on foot of a promissory note against the plaintiff and the 1st defendant jointly and the whole of the decree amount was collected from the plaintiff. In a suit brought by him for contribution, the 1st defendant pleaded that he and the plaintiff were engaged in an illegal partnership, that the amount of the promissory note was borrowed for that partnership, and that, under the circumstances, a suit for contribution was not maintainable.

Held, that the suit was maintainable, inasmuch as the plaintiff was under no necessity to rely on the joint wrong or to go behind the decree, and as the defendant could not succeed except by alleging and proving his own delinquency.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Cocanada in S. C. S. No. 305 of 1924.

P. Satyanarayana for *P. Somasundaram* for petitioner.

K. Bhimasankaram for *B. Satyanarayana* for respondent.

The Court delivered the following

JUDGMENT :—The suit is one for contribution. A suit was filed on a promissory note against the plaintiff and the 1st defendant and a decree was passed against them jointly. The whole of the decree amount was collected from the

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*C R P No. 616 of 1925. 19th January, 1927.

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plaintiff, who seeks to recover half of it from the 1st defendant. The latter's defence is that he and the plaintiff were engaged in an illegal partnership, that the money was borrowed for that partnership and that, under the circumstances, a suit for contribution does not lie.

It has been repeatedly held in this country, following the old English case of *Merryweather* v. *Nixon* (1) that a suit for contribution between wrong-doers does not lie. In a case from Scotland *Palmer* v. *Wick and Pulteneytown Steam Shipping Company, Ltd.* (2) the House of Lords refused to follow that decision, holding that it was not founded on any principle of equity. The Lord Chancellor said in his judgment:

"Why, then, should a co-debtor, who has paid the whole sum due. .... when he seeks to recover the share of his co-debtor, be subject more than other co-obligants to the answer that, the entire debt having been discharged, nothing remains due on the judgment, and that it can, therefore, no longer be proceeded on? The only answer, as it seems to me, must be that the joint debt resulted from a joint wrong and that the law will not permit or assist any wrongdoer to recover contribution from another. It will be observed, however, that this is to allow the defender to set up his own wrong by way of answer, for the pursuer makes out a *prima facie* case by the production of the judgment. He has no need to rely on the joint wrong, or to go behind the judgment"

He then went on to remark on *Merryweather* v. *Nixon*(1) that it did not appear to him to be founded on any principle of justice or equity or even of public policy, which justified its extension to the jurisprudence of other countries. It seems strange that a decision so characterised should have been imported into the law of India. Lord Watson took the same view, remarking that the merits of the rule were not such as to commend it to universal acceptation. He further observed :

"This is not an action brought by one delinquent against whom decree has passed in order to obtain contribution from his co-delinquent who has not been sued. The respondent company do not require to allege and prove either delict or quasi-delict as the foundation of their claim, which rests upon a decree constituting a civil debt against the appellant as well as against themselves. There might be some principle in a Court of law refusing to permit a suitor to aver and prove his own crime or moral delinquency as the medium of recovering from one whom he alleges to have been a co-delinquent. But the case is very different where the injured party's claim of damage is liquidated by a joint and several decree against all the delinquents. In that case—which is the present case—the sum decreed is simply a civil debt...... In this case, it is the

1. (1799) 8 Term Rep. 186. 2. (1894) A C 318.

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appellant who seeks to escape from the natural import of the decree, by going behind it in order to establish his own delinquency."

Now that is precisely the position here. The plaintiff produces the decree and proves that he has satisfied it. He is under no necessity to rely on the joint wrong or to go behind the decree. It is the defendant, on the other hand, who seeks to avoid the decree by alleging and proving his own co-delinquency. If any principle of public policy is involved, it is, it seems to me, that a suitor should not be allowed to succeed by setting up his own delinquency. That principle has been laid down in a decision of this Court in *V. Kamayya and another* v. *G. Mamayya* (3) and I think that it should be applied in this case. The plaintiff can succeed on producing the satisfied decree. There is nothing else that he has to do. The defendant cannot succeed except by alleging and proving his own delinquency and therefore must fail. The suit is decreed with costs throughout.

A. S. V. *Suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[IN THE ORDINARY ORIGINAL CIVIL JURISDICTION.]

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

T. Jamna Bhai Ammal ... *Plaintiff**

v.

A. Balakrishna Tawker and others ... *Defendants.*

Jamna Bhai Ammal v. Balakrishna Tawker.

Hindu Law—Maintenance of widow—Debts binding on the family—Priority of.

Under Hindu Law a widow's claim to maintenance is not a charge upon the estate of her deceased husband until it is fixed and specifically charged upon that estate either by agreement or by decree of Court and does not take precedence over unsecured debts which are binding on the family of her deceased husband.

N. Chandrasekhara Aiyar for plaintiff.

V.C.Gopalaratnam, M. Govinda Pillai and *A. V.Seshaiah* for defendants.

The Court delivered the following

JUDGMENT :—The question I have to decide in this suit is mainly a question of law—does a widow's claim to maintenance take precedence over debts binding on the family? The plaintiff is the mother of the 1st defendant who having become

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*C. S. No. 292 of 1926. 28th February, 1927.

3. (1916) 32 M L J 484.

Jamna Bhai Ammal v. Balakrishna Tawker.

an insolvent is now represented by the 4th defendant, the Official Assignee, in whom the insolvent's property has vested. The plaintiff's husband carried on business in diamonds and his son, the 1st defendant, assisted him in that business. It is not seriously disputed that the property of which the plaintiff's husband died possessed, was joint family property which on his death survived to his son the 1st defendant. The latter continued the business, but having incurred large debts was declared an insolvent. The Official Assignee sold some properties and paid off all the secured creditors. The estate now consists of a sum of money about Rs. 6,600 and a house at Tanjore. There are many unsecured creditors whose debts remain to be discharged and the question to be decided is, whose right takes precedence, the right of the plaintiff or the right of the creditors?

It is often difficult to reconcile the undoubted right of a widow to maintenance under the Hindu Law with the right of creditors against joint family property, but at present the law may be treated in certain respects as settled although the result of the cases may not be quite satisfactory. The right to maintenance when in competition with creditors' claims is often reduced to a shadow just as a Hindu son's right by birth becomes illusory in the face of the doctrine of pious obligation.

The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and specifically charged upon that estate either by agreement or by decree of Court. As a corollary from this, three propositions have been established. The widow's right is liable to be defeated by a transfer of the husband's property to a purchaser for value, unless the transfer has been made with the intention of defeating that right and the transferee has notice of such intention. (*Cf.* S. 39 of the Transfer of Property Act.) The fact that the purchaser in that case has notice of the widow's claim to maintenance, is immaterial for the obvious reason, that in the case of a widow under the Mitakshara law, there is always present such a claim and it is impossible to restrict on that account the right of male members to deal with the property. Secondly, it is also well settled that if a property belonging to the joint family is alienated for the discharge of family debts (that is, debts incurred for the benefit of the family) the right of the alienee overrides the right of the widow even if the alienee has notice of the widow's claim to maintenance. This case, I conceive, is unlike the other case of alienation I have first referred to, namely, the one governed by the principle of S. 39

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of the Transfer of Property Act, in so far as the transfer to the creditor cannot be invalidated by want of *bona fides* on his part. Thirdly, if the widow's claim has ripened into a specific charge it has priority over the claims of creditors whose rights have not been secured by alienation of property.

The point that arises in this case is, however, slightly different. On the one hand the widow's claim to maintenance has not ripened into a specific charge and on the other the creditors with whom we are concerned being unsecured creditors have similarly acquired no interest in the property. When such a conflict arises, the question is one of greater difficulty. [*See* in this connection *Johurra Bibi* v. *Sri Gopal* (1) and *Somasundaram Chetty* v. *Unnamalai* (2)]. But it seems to me that the principles now applied to the claims of widows to maintenance can lead to but one result. Although in theory a widow can get maintenance up to the limit of the proceeds of the share of her deceased husband, still when the maintenance is actually awarded to her, the family debts existing at the moment are deducted from the available assets and the rate of maintenance is fixed only with reference to the balance of the estate and the debts are thus clearly allowed to take precedence of the right to maintenance.

It was suggested that in the administration of an insolvent's estate a widow may be allowed in the way the creditors are to prove for the amount due to her subject however in this case to an estimate being made of the value of her right. This view, however, cannot be supported. If the estate is worth Rs. 10,000 and the family debts amount to Rs. 9,000, the rate of maintenance, it admits of no doubt, can be fixed only with reference to the balance, namely, Rs. 1,000. If next the debts are equal to the value of the estate (Rs. 10,000) the widow can get no maintenance at all. Can it then be consistently said that when the debts exceed the assets, that is in the case of the estate of a bankrupt (say, when the assets amount to Rs. 10,000 and the debts to Rs. 20,000) she can get some maintenance on the ground that her demand is provable in insolvency?

I am therefore of opinion that family debts take precedence of a widow's right to maintenance. The cases cited by Mr. N. Chandrasekhara Aiyar, the learned vakil for the

1. (1876) I L R 1 C 470.
2. (1920) I L R 43 M 800 : 39 M L J 179.

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plaintiff, have but a remote bearing on the question to be decided. Nothing, however, that I have said would preclude the plaintiff from having her claim met out of the surplus if any that may remain in the hands of the Official Assignee after payment of the family debts. Subject to this reservation the plaintiff's claim must fail. I may mention that this is not a claim against the 1st defendant personally but only against his estate in the hands of the Official Assignee.

The suit is dismissed, but, in the circumstances, I make no order as to costs.

The remuneration of Mr. Govinda Pillai, the Commissioner appointed in this case, is fixed at Rs. 50 and the plaintiff is directed to pay him that sum.

N. S. *Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[IN THE ORDINARY ORIGINAL CIVIL JURISDICTION.]

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Messrs. Ramakrishna Doss Chandrathna Doss ... *Plaintiff**

v.

P. Kesavalu Chetty and three others ... *Defendants.*

Messrs. Ramakrishna Doss v. Kesavalu Chetty.

Registration Act, Ss. 17 and 49—Equitable mortgage—Document recording already completed transaction—Registration, if necessary.

Where a document which was executed on 27th June, 1924, ran as follows:—"I *pledged* with you as collateral security the Collector's certificate relating to the house on 23rd June, 1924 .... I *borrowed* from you on the 24th, 25th and 26th sums amounting to Rs. 15,000 and agreed to pay interest"

Held, that the document did not constitute the bargain between the parties, but was merely the record of an already completed transaction and therefore did not require registration.

Subramaniam v. *Lutchman,* (1922) I L R 50 C 338 : 44 M L J 602 (P C) distinguished.

Krishnayya v. *Ponnuswami Aiyar,* (1923) I L R 47 M 398 : 46 M L J 295 referred to.

S. Guruswami Chetty for plaintiff.

K. Chakravarthi for 2nd defendant.

T. Krishnaswami Aiyangar for 3rd defendant.

O. Thanikachellam Chetty instructed by *Messrs. Short and Bewes* for 4th defendant.

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*C. S. No. 72 of 1926. 14th March, 1927.

Messrs. Ramakrishna Doss Chandrathna Doss v. Kesavalu Chetty.

The Court delivered the following

JUDGMENT :—The plaintiff sues on an equitable mortgage. The 1st defendant created the mortgage and as he has become an insolvent, the 4th defendant the Official Assignee now represents his estate. The 2nd defendant is the son of the 1st defendant and the 3rd defendant holds a subsequent mortgage.

The first point I have to decide is the one that has been raised on behalf of the 2nd defendant. I must clearly point out that this point has not been urged either by the 1st, the 3rd or the 4th defendants. They have expressly said they do not desire to urge that contention. The mortgage was created by deposit of title deeds. It now transpires that the 2nd defendant is in possession of a portion of the title deeds relating to this property. He produces them in Court and contends that as the deposit was not of all the title deeds a valid equitable mortgage could not have been created.

To deal with this argument, it is necessary in the first instance to examine whether it was a single house that was mortgaged or the property consists of two houses. It has been very clearly proved that on the date of the mortgage, the property was a single entire building having one street door and presenting the physical features of a single structure. The plaintiff before advancing the loan inspected the house and his evidence is to this effect. His statement has not been challenged in cross-examination. Moreover, the Corporation of Madras as well as the Taluk Office have treated the property as a single building. and I must hold that the property mortgaged is one house known as 3|4, Amman Koil Street.

The truth seems to be that originally there were two adjacent houses, 3, Amman Koil Street and 4, Amman Koil Street, and they were subsequently amalgamated and rebuilt as a single building. On the 23rd of June, 1924, the 1st defendant who applied to the plaintiff for a loan, handed to him certain title deeds, which were then presumed to be the entire set of deeds relating to the property. The plaintiff showed them to his lawyer who pointed out to him that the bundle of title deeds included Collector's Certificates only in respect of House No. 4 and that there were none in that bundle that related to House No. 3. The plaintiff however advanced to the 1st defendant on the 24th, 25th and 26th June 1924 monies amounting to Rs. 15,000. The 1st defendant apparently finding that he was not in possession of any sale deeds or certificates relating to No. 3, passed a letter

to the plaintiff dated the 27th of June, 1924 which contained a recital that the Certificates in respect of No. 3 had been lost. This letter satisfied the plaintiff and he took no further trouble over it. There is not the slightest doubt that the deposit was made with the intention of creating a security over the entire property. The title deeds handed to the plaintiff comprised not only the Certificates in respect of No. 4 but a copy of a partition deed which showed that both the houses Nos. 3 and 4 fell to the 1st defendant's share at a family division and that he was entitled to them. It is in virtue of this partition deed that the 1st defendant became the owner of both the houses and that deed may therefore be aptly described as the immediate source of his title. In the nature of things, the original partition deed could be only with one of the several parties who effected the division. The 1st defendant not being in possession of the original delivered a copy obtained from the Registrar's Office. We thus find that some of the older title deeds relating to a portion of the property were not deposited, while an authenticated copy of the latest deed relating to the entire property, which is the foundation of the 1st defendant's title was among the deeds handed to the plaintiff. In these circumstances, it is impossible to hold that a valid equitable mortgage has not been created. It must be remembered that the contest in this case is not between two rival mortgagees each producing a portion of the title deeds. On the contrary, this is an attempt made by the 2nd defendant to get rid of his father's transaction, taking advantage of the fact that he has somehow got possession of the missing documents. His contention is not only unjust but unsustainable in law. In the deed of subsequent mortgage executed in favour of the 3rd defendant, the 1st defendant made an admission that the whole property had been previously mortgaged to the plaintiff. I therefore reject this contention put forward by the 2nd defendant."

There remains another point to deal with—a point taken by the Counsel for the 4th defendant. He contends that a valid mortgage was not created as the document of the 27th of June was not registered. His argument is (1) that the oral evidence is not admissible under the Evidence Act, as the instrument constitutes the contract between the parties; (2) that the document is inadmissible in evidence under the Registration Act as it affects immovable property but is not registered. The point to be decided in such a case is: Does the document in question

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constitute the bargain between the parties or is it merely the record of an already completed transaction? Turning to the document it reads thus:—

"I *pledged* with you as collateral security the Collector's certificate relating to the said house .... on 23rd June, 1924."

The document is dated the 27th and it refers to a transaction which had taken place four days previously.

The document proceeds to say

"I *borrowed* from you on the 24th, 25th and 26th sums amounting to Rs. 15,000 and *agreed* to pay interest."

Again it is the past tense that is used. The passage says that the writer had already borrowed money and had already agreed to pay interest.

The most authoritative exposition of the law is that contained in the judgment of the Privy Council in *Subramanian* v. *Lutchman* (1). The test that was applied in that case was: Was the document in question the bargain between the parties? On the facts of that particular case it was held that the writing constituted the contract, that parol evidence could not therefore be given and that the document itself being unregistered did not create a valid mortgage. Let us look at the document in that case. It reads thus:

"We hand you *herewith* the title deeds .....This please hold as security. .... Please also hold this as further security."

There can be no doubt that this evidences the transaction itself and is not merely the record of an already completed transaction. In *Krishnayya* v. *Ponnuswami Aiyar* (2) the document was held to be the mere record of an already completed transaction. The words in that document are:

"So, let it be known that for that I have retained with you as collateral security my document of the Collector's Certificate No. 815 in respect of my house."

Sir Walter Schwabe, C. J., with whose judgment Ramesam, J., concurred, observed as follows:—

"If it constitutes the bargain, then, on the well-known rule that, where contracts are reduced to writing, you cannot give parol evidence of their contents, in order to prove the mortgage, the plaintiff would have to attempt to put in as evidence the document, and, if it is a mortgage document, he would be precluded from so doing, by the Transfer of Property Act and under the Registration Act."

1. (1922) I L R 50 C 338: 44 M L J 602 (P C).
2. (1923) I L R 47 M 398; 46 M L J 295.

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Looking at the document the learned Judges held that it did not constitute the bargain. The present case is a much stronger one. The instrument refers in no uncertain terms to the transaction having been completed some days previously. As was said in that case by Sir Walter Schwabe, C. J., "In order to arrive at the true facts in respect of that question, I think that the first thing to do is to look at the document itself." In this case there can be no manner of doubt that the document does not require registration. I have carefully followed the oral evidence and it also shows that the transaction had already been completed when this letter was written.

The only question that remains is, What are the amounts due to the plaintiff and the 3rd defendant? The plaintiff is content to take a decree calculating simple interest at 15 per cent. I pass a decree for the plaintiff for Rs. 20,343-12-0 with subsequent interest on Rs. 15,000 at 15 per cent. per annum from this date to the date fixed for payment. I pass a similar decree in favour of the 3rd defendant for Rs. 11,838-8-0 with subsequent interest upon Rs. 10,000 at 12 per cent. per annum from this date to the date fixed for payment. The costs of the plaintiff and the 3rd defendant shall be paid by defendants 1, 2 and 4. I fix the fee of the 2nd defendant's guardian *ad litem* at Rs. 150 which the plaintiff will be allowed to include in his costs. Time for redemption is three months.

The portion of the title deeds produced by the 2nd defendant is in Court and the same shall be treated as part of the deeds deposited with the plaintiff.

N. S. *Suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[IN THE ORDINARY ORIGINAL CIVIL JURISDICTION.]

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

C. N. Evalappa Mudaliar and another ... *Plaintiffs**

v.

T. Balakrishnammal ... *Defendant.*

Evalappa Mudaliar v. Balakrishnammal.

Civil Procedure Code, S. 92—Scope—Suit against person setting up claim adverse to the trust—Maintainability.

One *K* dedicated the suit property to charity appointing two trustees by a registered deed. About seven years after this, she executed a will bequeathing the same property and certain other property to the defendant and directing her to perform the charities by spending a certain amount

*C S No. 197 of 1925. 8th March, 1927.

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every year. The two trustees died and the defendant who took possession of the properties repudiated the trust and claimed that the ownership of the suit property remained in her but she was willing to carry out the charities mentioned in the will as per its terms. A suit was filed by relators under S. 92 of the Civil Procedure Code for appointing a new trustee and settling a scheme. The defendant raised the contention that the suit under S. 92 of the Civil Procedure Code was not maintainable.

Held, that the suit as framed was maintainable, though the defendant was in the position of an alienee who sets up a claim adverse to the trust.

Jafarkhan v. *Daudshak*, (1910) 13 Bom. L R 49 referred to.

To a suit under S. 92 of the Civil Procedure Code, a person who sets up a title adverse to the trust can be impleaded as a defendant but a decree cannot be passed against him to deliver possession of the property in his possession.

S. 92 of the Civil Procedure Code does not apply to a suit brought solely for the purpose of having a declaration that the property is trust property for the reason that the section pre-supposes the existence of a trust.

K. Bhashyam Aiyangar for plaintiffs.

R. Srinivasa Aiyangar and *Hari Row* for defendant.

The Court delivered the following

JUDGMENT :—This is a relator's suit under S. 92 of the Code of Civil Procedure filed with the sanction of the Advocate-General. The suit property originally belonged to one Kaveri Ammal. By a registered deed dated the 21st September, 1914 she dedicated the property to charity appointing two trustees (1) Ramanuja Mudaliar, and (2) Bhashyam Naidu. It is not disputed that so far as the language of the deed is concerned, the dedication was complete and that the donor reserved no rights for herself in the property. About 7 years after this, Kaveri Ammal executed a will of which probate has been obtained by the defendant. The latter is not strictly the grand-daughter of Kaveri Ammal, because she is only the daughter of Kaveri Ammal's son-in-law. The will deals with two properties one of them being the suit property. These two houses are bequeathed to the defendant and she is directed to perform certain charities. The object of the trust deed of 1914 is the performance of *utsavams* in the temple of Sri Ranganatha in Tiruneermalai village. It is necessary to notice the difference between the provisions of the trust deed and the provisions of the will. Whereas under the trust deed the entire income of the suit property was to be spent in performance of *utsavams* at Tiruneermalai, under the will the defendant takes the suit house and the other house, the gift being burdened with an

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obligation to spend Rs. 50 in performing *utsavams* at the said temple of Sri Ranganatha in Tiruneermalai and to spend another sum of Rs. 50 in conducting certain other *utsavams* in the temple of Parthasarathi at Triplicane, Madras. It will be noticed that by the will, the income of the two houses is amalgamated and a composite trust is created. This is again a point of difference between the deed and the will. What the defendant now does is this, she repudiates the trust and takes her stand upon the will. She says that so far as the ownership of the suit property is concerned, it remains in her, but that she is willing to carry out the charities mentioned in the will in accordance with its terms. Thus, the defendant repudiates the trust and sets up a right adverse to it. In these circumstances, the defendant raises the question: Is the suit filed under S. 92 maintainable?

I have been asked by the learned Vakil for the defence to say that the suit is not maintainable as being one against an alienee or trespasser. The defendant does not of course claim title under a conveyance *inter vivos* but she relies upon a testamentary disposition in her favour. The testatrix professing to be entitled to deal with the property, bequeathed it to the defendant and the latter says that the property is hers. She is thus in the position of an alienee who sets up a claim adverse to the trust. The question to be decided is, can such a suit be instituted under S. 92? To answer this question I must turn to S. 92, for after all the answer depends upon the right construction of that section. I shall read only what I think is the relevant portion of that section so far as the present point is concerned.

"Where the direction of the Court is deemed necessary for the administration of any such trust (any express or constructive trust created for public purposes of a charitable or religious nature), two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit and obtain a decree,

(*a*) ... ...
(*b*) appointing a new trustee;
(*c*) ... ...
(*d*) ... ...
(*e*) ... ...
(*f*) ... ...
(*g*) settling a scheme;
(*h*) ... ...

Has the direction of the Court become necessary for the administration of this trust? The two trustees originally

appointed, namely, Ramanuja Mudaliar and Bhashyam Naidu are dead. An adverse claimant has taken possession of the property and is repudiating the trust. Can it then be denied that the condition laid down in the first part of the section has been satisfied? In these circumstances, two persons with the sanction of the Advocate-General have filed a suit to obtain a decree

(1) appointing a new trustee;

(2) settling a scheme.

I find nothing in the section which compels me to hold that this suit is not competent. The contention of the learned Vakil for the defence is that to a suit under S. 92 you cannot implead as defendant a person who sets up a title adverse to the trust. I do not think that the proposition in such wide terms has ever been laid down; at any rate, if it has been, I must respectfully dissent from that view. What the Courts have said is, that in a suit under S. 92 a decree cannot be passed against the alienee or trespasser directing him to deliver possession of the property, as such a relief is not mentioned in the section. This is indeed a very different proposition from the one I am asked to accept. In this case, the plaintiffs do not seek to recover possession from the defendant. The decisions have also laid down that S. 92 does not apply to a suit brought solely for the purpose of having a declaration that the property is trust property, for the reason that the section pre-supposes the existence of a trust. I do not propose to pass any decree making a declaration that the property is trust property. The decisions therefore that have been quoted are not in the way of my granting suitable relief in this case.

As I have said, what the Courts have decided is, that a decree cannot be passed in a suit under S. 92 for possession against a person who is neither a *de jure* trustee nor a trustee *de son tort;* in other words, against a person, who repudiating the trust, sets up a claim adverse to it. But when I am asked to say that no suit can ever be filed under S. 92 against an alienee or a trespasser, I find it very difficult to follow the argument. The question has often arisen, whether to a suit for the removal of a trustee an alienee or a trespasser is a necessary or proper party? In a suit filed for removing a trustee, the Court has necessarily to give a finding that the property is trust property and that it has been wrongfully alienated by the trustee. Is this finding to be given in the presence of the alienee or without

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him on the record? If a decree for possession against the alienee cannot be passed in that suit (and I have shown it cannot), what is the effect of this finding when a second suit is instituted against the alienee, first, if he happened to be a party to the previous suit and secondly, if he did not happen to be such a party? These are questions on which the various High Courts in India have taken different views, but I am not concerned with them at present.

Let us try to understand what the defence really amounts to. The defendant is in possession of the suit property and it is said that a suit under S. 92 against her is incompetent. The question then arises, if such a suit is instituted, who is to be made a party? How is one to obtain any of the reliefs contemplated by S. 92? There are no trustees; none of the representatives of the founder beyond the defendant is available; and who then is to be made a defendant to the suit under S. 92? Then again, let us assume that the plaintiffs have filed this suit against the defendant in the ordinary way, and not under S. 92 (for the defendant contends that that is the right position). To whom is the Court to direct possession to be given? The plaintiffs are mere worshippers and *ex hypothesi* no new trustees have been appointed, a suit under S. 92 for appointing new trustees, in the circumstances, having been found impossible. There is no means therefore by which possession can be decreed to those rightfully entitled to it. These considerations will show that the contention of the defendant is fallacious. I may take a typical and familiar instance. Supposing there is in a village an ancient temple which has had no trustees within living memory; supposing also that you cannot trace either the founder or his heirs; the temple is in a neglected condition and I take it, that some neighbour has annexed it to his own private properties. In such a case, what is to be the procedure? If it is to be held that you cannot file a suit under S. 92 against the trespasser, the question naturally arises, who is to be impleaded as a defendant to such a suit? Is it suggested that you may take at random any chance worshippers and file a suit against them. Such a suit would be a farce. And what purpose would be gained by such a suit being filed? If a suit cannot be filed under S. 92 a scheme cannot be had and new trustees cannot be got appointed. If it is on the other hand to be held, that a suit has straightaway to be filed in the ordinary way against a trespasser, the question is, who is to file such a suit

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—there being no one competent to claim possession—as on my assumption there were no trustees to start with, nor have new trustees been appointed. I think I have sufficiently indicated the dilemma which a possible plaintiff has to face when confronted with a situation such as the present. The view that I have taken that such a suit is competent is supported by authority. The *obiter dicta* in *Venkatanarasimha Rao* v. *Subba Rao* (1) support this view. The following very terse statement of Spencer, J., I respectfully adopt :—

"If a trust has been 'created for public purposes of a charitable or religious nature' a suit will lie for settling a scheme 'where the direction of the Court is deemed necessary for the administration of the trust'."

Jafarkhan Jatbarkhan Pathan v. *Daudshah Mahomedshah Fakir* (2) is a case directly in point and is strongly in favour of the view I have taken.

I therefore think that both the wording of S. 92 and the reason of the thing alike demand that it should be held that a suit such as the present is maintainable and I hold accordingly.

Turning to the facts of the case, the defendant pleads that the deed of 1914 was brought about by undue influence and fraud. The defence has examined one witness and there is not even an attempt to prove the case set up in the written statement. Then it is urged that from the conduct of Kaveri Ammal, it must be inferred that she did not really intend to divest herself of ownership in the suit property. On this point again, there is absolutely no evidence. I may add that in the will she made, she expressly refers to the trust deed in such terms as to negative the idea that there were any vitiating circumstances attending its execution. I therefore record a finding that a trust for a public purpose of a charitable or religious nature was created.

What is the relief that can be granted in the suit? I have given a finding that the suit property was dedicated to the charity referred to in the plaint and that is all that is necessary. I cannot grant a declaration to that effect as such a declaration is neither called for nor does it come within the purview of the section. So, that relief is not granted and that is prayer No. 1. Prayers Nos. 2 and 4 relate to the appointment of new trustees and framing of a proper scheme. These two reliefs I am prepared to grant.

1. (1922) I L R 46 M 300. 2. (1910) 13 Bom. L R 49.

The case is adjourned to Thursday to enable the plaintiffs to bring in a proper scheme.

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The defendant is directed to pay the plaintiffs their costs of the suit.

N. S. *Suit partly decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice*, AND MR. JUSTICE SRINIVASA AIYANGAR.

Sri Ranga Thathachariar, late a minor by next friend Komalathammal, but now declared major and next friend discharged—*vide* Order, dated 1st February, 1926 in C M P No. 321 of 1926 ... *Appellant* (Plaintiff)*

v.

Srinivasa Thathachariar *alias* Srinivasa Raghavachariar ... *Respondent (1st defendant)*.

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Hindu Law—Joint family—Partition—Minor—Suit for partition on behalf of—Preliminary decree for partition in —Division in status in case of—Date of—Plaint or preliminary decree—Manager—Account—Liability for, before and after division in status—Distinction—Civil Procedure Code, Order 41, Rule 22—Decree—Meaning—Rights or causes of action decided against by Court below—Respondent's right to rely upon, without appeal or memorandum of objections.

In a suit for partition instituted on behalf of a minor, if the Court holds that a division is necessary in the interests of the minor and passes a preliminary decree for partition, it must be deemed that the divided status of the plaintiff dates from the date of the plaint, and not merely from the date of the preliminary decree for partition. The fact that the preliminary decree was passed on a consent statement of the parties does not make any difference.

In an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the *kartha* or manager is liable for is as to the existing state of the property divisible and the parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters. It is, however, open to the junior member to prove specifically any fraud or misappropriation or other improper conduct on the part of the manager with respect to such management. After a division in status the members are only tenants-in-common or co-sharers and the manager is strictly bound to account for all receipts and expenses, and can take credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deduction of such expenses must be divided between the members

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*Appeal No. 134 of 1923. 6th January, 1927.

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Though the word "decree" has been used in R. 22 of O. 41 of Civil Procedure Code, what the rule really contemplates is the decision by the Court below and merely enables the decision arrived at by the Lower Court to be supported on grounds other than those on which the Lower Court proceeded.

Under that rule it is not open to a respondent to have adjudicated by the Appellate Court rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 93 of 1918.

S. Varadachariar and *N. C. Vijayaraghavachariar* for appellant.

S. Panchapagesa Sastri and *C. V. Rajagopalachari* for respondent.

The Court delivered the following

JUDGMENT :—This is an appeal preferred by the minor plaintiff against the final decree for partition passed by the Subordinate Judge of Coimbatore in a suit for partition instituted by the minor plaintiff represented by his mother as next friend against the first defendant, who is his step-brother, and several others. The plaintiff is the son of the late Varadachariar, a resident of Coimbatore, by his third wife and the first defendant is the son by his second wife. Both the plaintiff and the first defendant were minors at the time of their father's death which occurred in November, 1913. The first defendant became a major in December, 1916 and since then he was acting as the manager of the family and the plaintiff is still a minor. The plaintiff's suit for partition was instituted on the 14th August, 1918 and a preliminary decree for partition was passed on the 7th April, 1921. One of the questions involved in this case is when did the plaintiff and the first defendant become divided in status? The determination of this question is necessary in order to fix the extent and nature of the liability of the first defendant to account for the management of the family properties and the income derived therefrom. The form of account to be ordered as against the first defendant as manager of the family till severance in status as between him and the plaintiff would be different from the form of account to be ordered against the first defendant after such severance. The learned Subordinate Judge held that it was the preliminary decree for partition passed by the Court on 7th April, 1921 that effected a division in status and on that

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basis he fixed the accountability of the first defendant. The correctness of that view is challenged before us in this appeal.

The contention which was strongly pressed before us by Mr. Varadachariar on behalf of the appellant is, that in a suit for partition launched on behalf of a minor, if the Court holds that a division is necessary in the interests of the minor and passes a preliminary decree for partition, it must be deemed that the divided status of the plaintiff dates from the plaint at least. It is now settled law that a clear and unambiguous expression of intention to become divided made by an adult co-parcener to the knowledge of the other members of the family effects a severance of the joint status so far as the person who expresses his individual volition is concerned. *Girja Bai* v. *Sadashiv Dhundiraj* (1). In the Full Bench decision of this Court reported in *Soundararajan* v. *Arunachalam Chetty* (2), it has been held that the filing of a plaint claiming partition amounts to an unambiguous manifestation of intention on the part of the plaintiff within the meaning of the ruling of the Privy Council in *Suraj Narain* v. *Iqbal Narain* (3). In a later decision of the Privy Council in *Kawal Nain* v. *Budh Singh* (4) their Lordships reiterated this principle and observed at page 498:—

"A decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not."

That is the law as regards a major co-parcener filing a suit for partition. But if a minor co-parcener institutes such a suit by his next friend, it has been held by this Court in *Chelimi Chetty* v. *Subbamma* (5), that the mere filing of a plaint on behalf of a minor would not *ipso facto* effect a severance of the joint family status, for in such a suit it is for the Court to determine whether the partition asked for will be beneficial to the minor. The same view has been followed in *Lalta Prasad* v. *Sri Mahadeoji Birajman Temple* (6). If such a suit proceeds to the stage of a decree in the plaintiff's favour on the Court finding that the partition would conduce to the best interests of the minor, the further question is whether the severance of the joint status takes place only from the date of the preliminary

1. (1916) I L R 43 C 1031: 31 M L J 455 (P C).
2. (1915) I L R 39 M 159· 29 M L J 816 (F B).
3. (1912) I L R 35 A 80 24 M L J 345 (P C).
4. (1917) I L R 39 A 496. 33 M L J 42 (P C).
5. (1917) I L R 41 M 442: 34 M L J 213. 6. (1920) I L R 42 A 461.

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decree or from the date of the plaint. On this question there is the direct authority of a recent decision of a Bench of this High Court *Krishnaswami Thevan* v. *Pulukaruppa Thevan* (7). It has been held in that case, distinguishing the decision in *Chelimi Chetty* v. *Subbamma* (5) that a suit by a minor for partition, if it ends in a decree for partition, has the effect of creating a division of status from the date of the plaint. In that case the question to be decided was whether the birth of another co-parcener in the family subsequent to the institution of the suit by the minor plaintiff and before the passing of a preliminary decree had the effect of diminishing the share which the plaintiff had on the date of the institution of the suit and for deciding that question it had to be determined whether the plaintiff became divided in status from the date of the plaint itself or from the date of the preliminary decree for partition. Spencer, J., in considering the effect of the decree for partition in such a suit stated at page 468:

"Therefore in my judgment the only sound principle will be to regard the prayer in the minor's plaint for division as a conditional request that, provided that the Court sees fit, it may declare the status of the minor divided as from the date of the plaint. It is true that there can be no division of status unless the Court sees fit to decree it, but there is no reason why the Court should not make its decree take effect from the date of the institution of the suit."

On the footing that by reason of the Court passing a decree in favour of the plaintiff for partition it effected a severance in the status of the family from the date of the plaint, it was held that the share which the plaintiff owned on the date of the plaint was not liable to be reduced by the subsequent birth of a member in the family. This decision having been given subsequent to the disposal of the suit by the Subordinate Judge, he could not consider the effect of it before arriving at his conclusion.

The view taken in the decision in *Krishnaswami Thevan* v. *Pulukaruppa Thevan* (7) does not appear to be really in conflict with the principle laid down in *Chelimi Chetty* v. *Subbamma*(5). In the latter case the partition suit filed by the minor had not reached the stage of a decree when the question arose for decision as to whether a division in status had been effected by the filing of a plaint on behalf of the minor plaintiff. The only point which directly arose for consideration was whether the filing of a plaint asking for partition *ipso facto* effected a severance of the family status and it was answered in the negative. As

5. (1917) I L R 41 M 442: 34 M L J 213.
7. (1924) I L R 48 M 465: 48 M L J 354.

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to what would be the result if in such a suit the Court had passed a preliminary decree for partition, there was no necessity to decide in that case. In *Krishnaswami Thevan* v. *Pulukaruppa Thevan* (7) such a question arose directly for decision and was decided. Accepting the principle that in a suit for partition brought by the minor it is for the Court to determine whether the partition would be advantageous to the minor or not and that a severance in the status of the family could not be effected by the individual volition of the minor's guardian or next friend, still, when the Court thinks fit on a consideration of the circumstances set forth in the plaint to decree partition of the family properties, the imprimatur of the Court must be deemed to have been placed on the allegations made in the plaint justifying the effecting of a partition. That being so, the Court must be deemed to have determined that, even on the date of the plaint, it would have allowed a partition to be effected as it was beneficial to the minor. Though the enquiry has necessarily to be made by the Court subsequent to the filing of the plaint, it is the state of affairs that existed on the date of the suit that determines the exercise of the Court's discretion. It seems to us therefore that the principle of the decision in *Krishnaswami Thevan* v. *Pulukaruppa Thevan* (7) has to be applied to the present case. We hold that the plaintiff must be deemed to have become divided in status from the first defendant from the date of the plaint, namely 14th August, 1918, by reason of the Court having passed a preliminary decree in this suit allowing the partition of the family properties.

It is urged on the first defendant's side that the Court passed a preliminary decree in this case on the 7th April, 1921 in accordance with a consent statement filed by the parties and not upon an enquiry as to whether a partition would be for the benefit of the minor or not. The soundness of this argument is open to doubt. The first defendant, who was contesting the plaintiff's claim for partition, subsequently consented to the passing of a preliminary decree in his favour and thereby abandoned the pleas which he raised in opposition to the plaintiff's claim for partition. Virtually the abandonment of his contentions by the first defendant had the effect of leaving unchallenged the allegations made in the plaint for showing that the partition is necessary and beneficial to the minor and there-

7. (1924) I L R 48 M 465: 48 M L J 354.

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fore the Court thought fit to pass a preliminary decree in plaintiff's favour. The fact that the preliminary decree in this case was passed on a consent statement does not make any difference.

The finding of the Lower Court on this point is modified and we hold that the plaintiff became divided in status from the first defendant not from the date of the preliminary decree (7th April, 1921) but from the date of the institution of the suit, namely, 14th August, 1918.

The form of account to be ordered depends upon this finding. The Lower Court directed accounts to be taken on the basis that the plaintiff and the first defendant became divided in status only from 7th April, 1921. So long as the family was in a state of non-division, the liability to account on the part of the first defendant as the manager or *kartha* of the family would be as stated in the decision in *Parmeshwar Dube* v. *Gobind Dube* (8). It was held in that case that in an ordinary suit for partition, in the absence of fraud or other improper conduct, the only account the *kartha* or manager is liable for is as to the existing state of the property divisible and the parties have no right to look back and claim relief against past inequality of enjoyment of the members or other matters. With reference to the management of the first defendant prior to the date of the plaint, the mode of his accountability is as stated above and it is open to the plaintiff to prove specifically any fraud or misappropriation or other improper conduct on the part of the first defendant with respect to such management and, in the absence of such proof, what the Court has to proceed upon is the assets of the family as they existed at the date of the suit, but subsequent to the date of the suit, the plaintiff and the first defendant were only tenants-in-common or co-sharers and therefore the 1st defendant is strictly bound to account for all receipts and expenses and, as observed by the Lower Court, can take the credit only for such expenses as have been incurred for the benefit or necessity of the estate, and the net income after deduction of such expenses will have to be divided equally between him and the plaintiff. As the accounts have to be taken in accordance with the above findings, a remand of the suit is necessitated and the Lower Court should give the necessary directions for taking accounts in the light of the above observations and

8. (1915) I L R 43 C 459.

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finally determine how much amount should be decreed to the share of the plaintiff or of the first defendant.

This appeal having been posted for being spoken to this day, the Court delivered the following

JUDGMENT :—*Srinivasa Aiyangar, J.* :—On behalf of the respondent it has now been sought to be argued that he would be entitled under the provisions of R. 22 of O. 41, C. P. Code, to support the decree given by the Lower Court for the particular amount even on grounds which may relate to the portion of the adjudication or decision by the Lower Court not appealed against or in respect of which no objections have been filed by the respondent. It is contended that the expression 'support the decree' in R. 22 merely refers to the amount for which the decree is passed and because the expression 'decree' is used in that rule, it authorises or enables the respondent to make out a case for a decree for that amount by questioning some adjudication by the Lower Court with regard to rights found against the party by the Lower Court and in respect of which no appeal or objection has been filed. For this purpose the learned vakil for the respondent has referred to two cases decided by the Chief Court of Punjab, *Muhammad Ali* v. *Parmanand* (9) and *Shankar Lal* v. *Madari Singh* (10). In the former case what was really held was that even though one item in an account may be found by the Court of Appeal against the respondent and on that footing the amount for which a decree has been granted by the Lower Court may have to be reduced, still the decree might be supported by showing that in respect of some other item the Court below made a mistake. But when the relief granted depends upon the adjudication by the Lower Court with respect to rights or causes of action, it is inconceivable that such decision or adjudication should be sought to be attacked in the Appellate Court without any notice whatever to the other party. Though the word 'decree' has been used in R. 22 it is clear that what the rule contemplates really is the decision by the Court below and merely enables the decision arrived at by the Lower Court to be supported on grounds other than those on which the Lower Court proceeded. We are satisfied that under that rule it is not open to a respondent to have adjudicated by the Appellate Court rights or causes of action which have been decided against him in the Court below and in respect of which he has filed no appeal or memorandum of objections.

9. (1917) 45 I C 232. 10. (1910) 7 I C 484.

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There is, however, one point to which the learned vakil for the respondent has drawn our attention. On the decision of this Court it has been directed that the plaintiff would be entitled to have an account from the 1st defendant from the date of the plaint instead of from the date of the preliminary decree as directed by the Lower Court. There are some items which have been allowed by the Lower Court to the plaintiff in its judgment and it is possible that some of those items which have been allowed to the plaintiff relate to the period subsequent to the institution of the suit. If on the taking of the accounts directed by this Court it should be found by the Lower Court that any of the items already allowed to the plaintiff relate to the period subsequent to the institution of the suit those items should be deleted and be merely included in the taking of the accounts and all such items if so found would have to be deducted from the amount already allowed to the plaintiff. Similarly if in respect of any of the other matters it should be found that any items relate to the period subsequent to the institution of the suit and therefore liable to be included in the account ordered to be taken, those items would also be excluded by the Court.

The Court-fees paid by the appellant for the appeal and by the respondent for the Memorandum of Objections will be refunded to them respectively. The appellant will have the costs of the appeal.

A. S. V. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.].

PRESENT :—LORD PHILLIMORE, LORD CARSON, LORD DARLING AND MR. AMEER ALI.

Vibhudapriya Thirtha Swamiar ... *Appellant**

v.

Lakshmindra Thirtha Swamiar ... *Respondent.*

P. C. —— Vibhudapriya Thirtha Swamiar v. Lakshmindra Thirtha Swamiar.

Hindu Law—Loan by Mahant for purposes of math—Custom Liability of succeeding Mahant—Receiver of Math—Income—Form of decree

Where monies lent to the deceased head of a math are sought to be recovered what has to be seen is firstly whether the debts were contracted by the deceased for his own purposes or for the purposes of the temple and in discharge of the duties under which he lay in the performance of

*P. C. Appeal No. 54 of 1924. 21st March, 1927.

P. C.
—
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the worship and the feeding of pilgrims, and, secondly, whether the borrowed monies were legitimately applied for those purposes.

Palaniappa Chetty v *Deivasikamony Pandara Sannadhi*, (1917) I L R 40 M 709 : L R 44 I A 147 : 33 M L J 1 (P C) distinguished.

Decree of the High Court varied.

Appeal from a decree of the Madras High Court varying a decree of the Subordinate Judge of South Kanara.

The facts and contentions appear in the judgment reported below (*see* 44 M L J 187.).

Sir George Lowndes, K. C., and *Narasimham* for appellant.—The debt is binding, the test being, was the debt truly contracted for the purposes of the math, *Sammantha Pandara* v. *Sellappa Chetti* (1) and *Vidya Varuthi Thirtha* v. *Balusami Aiyar* (2). Even if necessity is the test there was necessity, *Niladri Sahu* v. *Chaturbhuj Das* (3). On the form of the decree the following cases were cited: *Srimath Daivasikamani* v. *Noor Mahomed Rowthan* (4), *Lakshmindrathirtha* v. *Raghavendra Rao* (5), *Sundaresan Chettiar* v. *Viswananda Pandara* (6).

Dunne, K. C. and *Dube* for respondent.—The test to be applied is that as in *Murugesam Pillai* v. *Manickavasaka Pandara* (7) and *Palaniappa Chetty* v. *Deivasikamony Pandara Sannadhi* (8).

Sir George Lowndes, K. C. replied.

21st March, 1927. The Judgment of their Lordships was delivered by

Mr. Ameer Ali.

MR. AMEER ALI.—The appellant in this case is the Matadhipathi or superior of the Admar Math at Udipi in the South Kanara District, and he sues the defendant, the present Matadhipathi of another institution called the Sirur Math (in the same town) for certain monies which he alleges are due to him by the defendant's predecessor in office. The defendant is a minor and defends this action by his father as guardian.

The plaintiff alleges that the predecessor of the defendant borrowed the money for the purposes of the Math, and the

1. (1879) I L R 2 M 175 at 179.
2. (1921) I L R 44 M 831 at 844: L R 48 I A 302, 315, 316: 41 M L J 346 (P C).
3. (1926) I L R 6 Pat. 139: L R 53 I A 253: 51 M L J 822 (P C).
4. (1907) I L R 31 M 47: 17 M L J 553.
5. (1920) I L R 43 M 795 39 M L J 174.
6. (1922) I L R 45 M 703: 43 M L J 147.
7. (1917) I L R 40 M 402: L R 44 I A 98: 32 M L J 369 (P C).
8. (1917) I L R 40 M 709: L R 44 I A 147: 33 M L J 1 (P C).

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transactions ranged over a long period from 1902 until about the time of his death in 1916; that a settlement of account was arrived at on the 14th August in that year and an acknowledgment was signed by the deceased Matadhipathi (Ex. C on the record).

The Sirur Matadhipathi died on the 27th September, 1916, and the plaintiff brought his suit against his successor on the 14th August, 1919. It should be mentioned that as the deceased Matadhipathi had made no nomination in his lifetime the superior of the connected Sodi Math appointed the defendant as his successor.

The plaintiff's claim was denied on behalf of the defendant; the acknowledgment (Ex. C) was charged to be a forgery, and it was further contended that even if the debts were genuine the assets of the Math were not liable for the money borrowed by the deceased Swami.

The case went to trial before the Subordinate Judge of South Kanara who held that the impugned transactions were true, and that Ex. C. was genuine, and that the debts were contracted by the deceased Matadhipathi for legitimate purposes, and that the Math assets were liable for their satisfaction. He accordingly decreed the plaintiff's claim.

From his decree there was an appeal to the High Court of Madras, which differing from the trial Judge dismissed the plaintiff's suit, in so far as it sought to make the assets of the Math answerable for the debt. The learned Judges held in substance that the plaintiff had failed to show that the debts for which the suit was brought were contracted for necessary purposes and that consequently the Math was not liable. They, however, decreed the claim in regard to the personal assets of the deceased that had come into the defendant's hand.

The plaintiff has appealed from the decree of the High Court to His Majesty in Council and the main question for decision is with regard to the liability of the Math assets for the satisfaction of his debt.

It is in evidence that in the town of Udipi there are eight Maths each presided over by a superior or *swamiar*. They appear to form 4 groups connected by a tie which permits in case of the superior of one Math dying without nominating a successor the superior of the other Math to *appoint* a successor to the deceased *Swamiar*.

Besides these Maths there is a temple dedicated to Krishna, one of the manifestations of Vishnu, perhaps the most popular

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deity forming the Hindu Triad. Admittedly it has no superior but the affairs of the Krishna-temple are managed by the superiors of the eight Maths in turn.

The important ceremonies connected with the temple of Krishna are performed during the *Pariyaya* which lasts from the 15th January in one year to the middle of January two years later. During this period the superior of the Math whose turn it is, usually called the *Pariyaya Swami*, has absolute power over the performance of the rites and ceremonies.

The South Kanara Manual, published under the authority of Government, contains the following description regarding these Maths:

"The Temple of Krishna, at Udipi, is said to have been founded by Madhavacharya himself who set up in it the image of Krishna originally made by Arjuna and miraculously obtained from a vessel wrecked on the coast of Tuluva . . . Besides the temple at Udipi he established eight 'Mathas' or sacred houses, each presided over by a *sanyasi* or *swami*. These exist to this day and each *swami* in turn presides over the temple of Krishna for a period of two years and spends the intervening fourteen years touring throughout Canara and the adjacent parts of Mysore levying contributions from the faithful for the expenses of his next two years of office, which are very heavy as he has to defray not only the expenses of the public worship and of the temple and Matha establishments, but must also feed every Brahmin who comes to the place."

Madhavacharya, who was born in the 12th century of the Christian era, is credited with introducing Vaishnavism cult or the Krishna cult in Southern India.

The evidence in this case fully accords with the description in the Manual.

The plaintiff in support of his claim examined besides himself a number of witnesses on whom the Subordinate Judge relied. Among them is an old servant of the Sirur Math who had been in service for 25 to 30 years. He speaks to the rebuilding of the Dining Hall which had become dilapidated and to the expenses connected with the *Pariyaya*.

Another witness is the superior of one of the other Maths in Udipi, Sudindra Thirtha, who speaks as follows:

"I am one of the *Swamis* of the eight Mutts at Udipi. There is a custom that these eight Mutts should perform *Pariyaya* in the Shri Krishna Mutt . . . The *Swami* of each of the eight Mutts should perform *Pariyaya* for a period according to turn. The said custom of performing *Pariyaya* prevails from the days of Madhwachariya. Provisions have to be kept ready for the *Pariyaya*. Rice has to be stored. This storing commences from about a year before the *Pariyaya*."

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After stating the quantities of provisions to be stored for the festival he describes in the following terms the expenses he himself incurred whilst he was in charge of the *Pariyaya*.

"I have performed two *Pariyayas* My second *Pariyaya* was from 17th January, 1912, to 16th January, 1914. I have incurred a debt of Rs. 30,000 during the said *Pariyaya* period. It was a debt contracted to conduct the *Pariyaya*. The *Pariyaya* of the Sirur Mutt commences after the *Pariyaya* of my Mutt is over. A debt of Rs. 25,000 was contracted during my first *Pariyaya*. I know Lakshmi Samudra Tirtha Swami (the deceased superior) was not extravagant but was very frugal in expenditure. My Mutt has an income of about Rs. 10,000 per annum excluding assessment The Mutt of Krishna has an annual income of about 500 muras of rice and Rs. 500 in cash from lands. Besides this it gets a total tasdick of Rs. 13,000 per annum from the British Government and Mysore State. The *Swami* of the *Pariyaya* Mutt has to meet the rest of the expenditure either from the accumulations of the income already made or by borrowing funds. During the *Pariyaya* period of 2 years offerings by devotees or pilgrims may amount to Rs. 25,000. But Rs. 12,000 have to be spent out of it for making presents to them. It is not possible to meet the expenditure of the *Pariyaya* period from the income of the above-mentioned Mutt of Shri Krishna, *i. e.*, tasdick income from lands, and offerings from devotees and pilgrims. At the *Pariyaya* festival about 10,000 persons are fed per day."

The plaintiff himself, who is the superior of the Admar Math, speaks thus of the heavy expenses incurred in performing the worship and the attendant ceremonies:—

"The aforesaid sums were borrowed by the late Sirur Swami for the expenses of his *Pariyaya*. Udipi Krishna temple has lands and also gets *tasdick* and these are got by the *Pariyaya* Swami for the time being. Those incomes are not sufficient for the expenses of the *Pariyaya* The *Pariyaya* Swami also gets *kanikas* (offerings or presents) from votaries and pilgrims during the *Pariyaya* period. The income of the Mutt of the *Pariyaya* Swami is also utilised for the *Pariyaya* expenses. All these incomes are not sufficient to meet the expenses of the *Pariyaya*. The *Pariyaya* Swami before his turn of *Pariyaya* commences has to store articles, viz., rice, firewood and other provisions and also to grow plantain plantations. For all these the income of the Krishna temple is not available. I have heard that Sirur Mutt has an income of about Rs. 16,000 a year. As the income of the Sirur Mutt and that of the Krishna temple and also the offerings of the votaries were not sufficient for the *Pariyaya* expenses, the late Sirur Swami had to incur debts. The Bhojanasala (Dining Hall) constructed by the late Sirur Swami would cost about Rs. 20,000."

In the Manual there is a further reference to the *Pariyaya*:—

"The periodical change of the Swami presiding over the temple of Krishna is the occasion of a great festival known as the *Pariyaya* when Udipi is filled to overflowing by a large concourse of Madhvas not only from the district but from more distant parts, especially from the Mysore territory."

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Mr. Justice Krishnan in his judgment in the case remarks:

"There are no doubt certain poojas and ceremonies which have necessarily to be performed and any reasonable expenditure incurred for carrying them out will be binding on the Mutt. But there is no obligation to have the ceremonies performed on the scale that the Sirur Swami did."

It is admitted that no scale of expenditure is fixed for the performance of the ceremonies beyond recognised custom and usage. They have to be performed according to the practice which has prevailed for centuries. The Dining Hall was falling to pieces, and the Government appears to have intimated to the superior that unless it was rebuilt and put in proper order its contribution would be withdrawn. It is in evidence that in executing the necessary repairs considerable cost was incurred. It can hardly be said that the expenditure for these purposes was not legitimate.

According to Mr. Justice Ramesam, the second Judge, the necessity for the debt in order to bind the *Math* must be *"justifiable."* He says:—

"It is idle to pretend that the feeding could have gone on anything like this scale in all the six centuries during which these Mutts existed or even in the earlier years of the last century."

Referring to the case of *Palaniappa Chetty* v. *Deivasikhamony Pandara Sannadhi* (8) the learned Judge observes:—

"It would be an instance of the misapplication of the word 'custom' and of forgetfulness of essentials of a custom which modifies the ordinary law to say that the Mutts are bound by custom to feed every Brahmin that comes to the *Pariyaya* (as is stated in the South Kanara Manual). The numbers may increase as the years roll on and the result of carrying out the idea of feeding every one that comes may be the destruction of the institutions themselves. The Swamis have a wide power over their income and Courts do not ordinarily scrutinise their manner of exercising it so long as they do not seek to bind their successors. If a successor is sought to be bound the borrowing must be for justifiable necessity."

The learned Judge seems to have misapprehended the effect of their Lordships' judgment in *Palaniappa Chetty's* case. In that case one head of a Math had purported to alienate in perpetuity certain lands of the institution; and the impugned alienation was attempted to be supported by an alleged custom. The remarks of the Board relate to this contention; they lay down no general rule.

He seems also to have overlooked the fact that the facilities for travelling afforded by the present conditions of the country materially account for the larger influx of pilgrims and

8. (1917) I L R 40 M 709: L R 44 I A 147: 33 M L J 1 (P C).

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worshippers, without imputing blame or dereliction of duty to the *Swami*. As pointed out in the case of *Vidya Varuthi Thirtha* v. *Balusami Aiyar* (2), these superiors "have ample discretion in the application of the funds of the Maths, but always subject to certain obligations and duties equally governed by custom or usage." In the South Kanara Manual also, there is an account of the vast concourse that flocks to the temple of Krishna on the recurring *Pariyaya* and the duty sanctioned by ancient practice, which rests on the superior in charge.

These Matadhipathis have a difficult task to perform; unaided by any established rule they are expected to exercise control over the numbers of pilgrims, who come to the temple in order to participate in the festivals and share in the food offerings. Even if it were permissible for the superior to exclude a certain number from being fed, their Lordships doubt whether popular sentiment would sanction his so doing. The obligations under which they labour are regulated by custom, which are of long standing and have been observed for centuries.

What their Lordships have to see in this case is, firstly, whether the debts were contracted by the deceased *Swami* for his own purposes or for the purposes of the Temple and in discharge of the duties under which he lay in the performance of the worship and the feeding of pilgrims; and, secondly, whether the monies so borrowed were legitimately applied for those purposes.

In *Niladri Sahu* v. *Chaturbhuj Das* (3) the superior of a Math desirous of improving the houses for the lodgment of Rajahs and other rich devotees who visited his Math for the purpose of worship, built fitting habitations for them and attached the same to his institution. It was found that the revenue of the Math, although sufficient to meet the ordinary expenses of the worship, was insufficient to defray the cost of the construction, maintenance and management of these new buildings.

The superior accordingly began to borrow, from time to time, from moneylenders various sums of money to pay for these constructions. It was also found that the borrowed money was applied partly to the performance of the necessary worship; and that the Math was making use of the buildings constructed by the superior. The Board directed the appoint-

2. (1921) I L R 44 M 831: L R 48 I A 302: 41 M L J 346 (P C).
3. (1926) I L R 6 Pat 139: L R 53 I A 253: 51 M L J 822 (P C).

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ment of a receiver in respect of the usufruct, which ordinarily went to the superior to apply the same for the payment of the debts contracted by him.

Their Lordships think that the proper course to take in the present case should be the same, viz.: to remit the case to the High Court, to send it down to the Subordinate Judge with the following directions: that in case the guardian of the defendant does not pay within three months from the arrival of the record the sum sued for, plus interest at the contractual rate until payment, the Trial Court should appoint a receiver for the rents and issues of the Math property and the proceeds from offerings, etc., and after payment of all expenses connected with the Math and the performance of the ceremonies and festivals and a reasonable provision for the maintenance of the Matadhipathi, the balance should be applied in discharge of the plaintiff's debt until such debt has been paid off. The order of the High Court will be discharged.

The appellant is entitled to his costs in all the Courts, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant : *Chapman Walker & Shephard.*
Solicitor for respondent : *H. S. L. Polak.*
H. C. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR VICTOR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

Tangella Narasimhaswami, Dharmakartha of
Sri Kodanda Ramachandra Moorthy ... *Appellant**
(1st defendant)

v

Iamidi Venkatalingam and others ... *Respondents (Plffs.).*

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Narasimhaswami v. Venkatalingam.

Trusts Act, Ss. 1, 5—Religious trust in relation to immoveable property—Deed creating—Registration—Necessity—Dedication of property to God by a Hindu—Writing—Necessity—Deed of dedication—Registration—Necessity—Transfer of Property Act, S. 123—Applicability—Deed recording past transaction—Registration—Necessity

The second defendant became ill and in pursuance of a vow then made he built a temple and installed the idol of Sri Kodanda Ramachandra

*S. A. No. 71 of 1924. 20th January, 1927.

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Moorthy there. A few years afterwards he purchased some lands for endowing the same for the worship of the idol. Three years afterwards he executed Ex. I. Ex. I, which purported to be merely an agreement between the 1st and 2nd defendants, provided, *inter alia,* as follows:—

"I have constituted you as Dharmakartha to Sri Kodanda Ramachandra Moorthy Varu consecrated by me in the aforesaid village and to arrange for the performance of daily offerings of lighting, dhoopam and Naivedyam, etc., and also for the Kalyana Uthsavams to be performed every year and for paying wages to the Archaka, musicians, etc., the servants of the temple, and I have this day granted the inam land worth Rs. 3,000 with fruit trees, etc., as gift to Sri Kodanda Ramachandra Moorthy towards the expenses of lighting, dhoopam and Naivedyam for Kalyana Uthsavams, etc. Therefore whenever you want I would execute on proper stamp paper on any day from this date as desired by you at my cost. With the aforesaid stipulations, this agreement is executed stipulating that I should deliver possession of the said land on the very day I execute the gift deed, that I should tender proper accounts for the money that I might realise by renting out the said land. I made you believe that I did not alienate the said property before this either by sale or mortgage, etc., and I execute this agreement."

Held by the Full Bench, that the document did not require registration and was effectual to pass title to the idol, though unregistered.

The gift was not made by Ex. I and the document was merely a record of a past transaction.

Even if Ex. I conferred any present title, it did not require registration, as the trust to which it related was a religious trust exempted by S. 1 of the Trusts Act. S. 123 of the Transfer of Property Act had no application because the transfer was not to a living person.

Per Kumaraswami Sastriar, J—Dedication of property to God by a Hindu does not require any document and property can be validly dedicated without any registered instrument.

Second appeal against the decree of the Court of the Subordinate Judge of Narsapur in A. S. No. 210 of 1922 preferred against the decree of the Court of the Principal District Munsif of Narsapur in O. S. No. 710 of 1920.

C. Rama Rao for appellant.

P. Somasundaram and *P. Satyanarayana* for respondents.

The Court (Sir Victor Murray Coutts Trotter, Chief Justice) made the following

ORDER OF REFERENCE TO A FULL BENCH :—I think the most convenient course in this case will be to refer the whole case, which of course turns on the construction of Ex. I, to a Full Bench. The appellant relies upon an authority, *Pallayya* v. *Ramavadhanulu* (1), which I confess myself quite unable to understand. Towards the beginning of the judgment the deed

1. (1903) 13 M L J 364.

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is recited and described as a dedication of the land to the idol. In the next paragraph the learned Judges speak of the dedication of the idol and land to the public. Those two expressions seem to me to be quite inconsistent and I think it had better be laid down whether that case is an authority that is to be followed, and an authority for what proposition. In the present case the matter is complicated by the fact that although there is a categorical statement that there has been a grant of the land to the idol, there is also a recital at the beginning that the agreement embodied in the document was an agreement in favour of Narasimhaswami who by the instrument is constituted dharmakartha. The question will be whether the learned Judge was right in law in holding that Ex. I was a document which required registration.

C. *Rama Rao* for appellant.

P. *Somasundaram* and P. *Satyanarayana* for respondents.

The Court delivered the following

Kumaraswami Sastri, J

JUDGMENTS :—*Kumaraswami Sastri, J.* :—This appeal arises out of a suit to set aside an order passed against the plaintiff who attached the properties in execution of a decree which he obtained against the 2nd defendant. A claim was preferred by the 1st defendant alleging that the land was dedicated by the 2nd defendant to Sri Kodanda Ramachandra Moorthy Varu and that possession was given to him as Dharmakartha. The District Munsif dismissed the plaintiff's suit on the ground that the property passed to the temple but this decree was reversed by the Subordinate Judge on the ground that Ex. I which is produced as evidence of the dedication requires registration and as it was not registered no title passed to the idol. It is contended in Second Appeal by the appellant that the document does not require registration as (1) it is a document constituting a religious trust and neither S. 5 of the Trusts Act nor S. 123 of the Transfer of Property Act applies, (2) that the dedication to the temple was made before the date of the instrument, and the document merely records what happened, (3) that the document should be treated as an agreement to transfer the property to the trustee whenever he required a conveyance and that such a transaction is covered by the proviso to S. 17 of the Registration Act, and (4) that subsequent to Ex. I a registered document was executed as provided in the agreement and that although the registered document was after the attachment it

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is not invalid as it was executed in pursuance of a prior arrangement.

The following facts are not disputed. The 2nd defendant became ill about 8 years before the date of Ex. I and in pursuance of a vow then made he built a temple and installed the idol of Sri Kodanda Ramachandra Moorthy there. He wanted to endow land for the worship of the idol and obtained a sale deed of the land which is now in dispute in 1913. In 1916 Ex. I was executed. Ex. I purports to be merely an agreement between the 1st and 2nd defendants. The material portion runs as follows:—

"I have constituted you as Dharmakartha to Sri Kodanda Ramachandra Moorthy Varu consecrated by me in the aforesaid village and to arrange for the performance of daily offerings of lighting, dhoopam and Naivedyam, etc., and also for the Kalyana Uthsavams to be performed every year and for paying wages to the Archaka, musicians, etc., the servants of the temple, and I have this day granted the inam land worth Rs. 3,000 with fruit trees, etc., as gift to Sri Kodanda Ramachandra Moorthy towards the expenses of lighting, dhoopam and Naivedyam for Kalyana Uthsavams, etc. Therefore whenever you want I would execute on proper stamp paper on any day from this date as desired by you at my cost. With the aforesaid stipulations, this agreement is executed stipulating that I should deliver possession of the said land on the very day I execute the gift deed, that I should tender proper accounts for the money that I might realise by renting out the said land. I made you believe that I did not alienate the said property before this either by sale or mortgage, etc., and I execute this agreement."

Then follows the description of the property. I think the effect of the document is to recite the fact that the 2nd defendant constituted the 1st defendant as Dharmakartha, conferring on him the trusteeship in respect of the land dedicated to the idol and promising to grant a conveyance to the 1st defendant as Dharmakartha whenever he required it. The document specially states that it is an agreement between the parties. It does not state that the constitution of the Dharmakartha or the gift was to be by virtue of that document but it refers to the two acts having been already done, and states that the 2nd defendant would execute the deed and deliver possession of the property to the Dharmakartha whenever he wants it, he the 2nd defendant being in the meantime accountable. In deciding whether a document requires registration or not one has to take the document as a whole and construe it with reference to the terms and not as to what might have been the intention. In

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Rajangam Aiyar v. *Rajangam Aiyar* (2) it has been held by their Lordships of the Privy Council that a document which does not by itself convey property but merely gives a right to call for another document does not require registration. I may pointout in this connection that if Ex. I was really a deed which appointed the 1st defendant as Dharmakartha and which transferred the property to the temple there was no necessity for the important clause that the 2nd defendant would, whenever the 1st defendant wanted, execute on a proper stamp paper a formal deed of conveyance or why he should reserve possession till the execution of such a deed but in the meantime hold himself accountable for the rents and profits. A trust is in effect the gift of property or an interest in property to a person or institution by or through the intervention of a trustee and this document evidences such a transaction. In this view it is clear that the document comes within the saving clause of S. 1 of the Trusts Act and S. 5 which relates to the creation of trusts and which requires registration of deeds of trust relating to immoveable property does not apply. If the document is merely one which records a past transaction and gives another party a right to call for a formal document it is exempted under the Registration Act. In any view the document, in my opinion, does not require registration.

It has been argued that a gift to an idol of lands worth over Rs. 100 requires registration and that a mere recital in another document of a gift which had been made would not pass property. It has been held that dedication of property to God by a Hindu does not require any document and that property can be validly dedicated without any registered instrument. It should be noted that in the present case the deed Ex. 'I' states that the property was "granted to God Sri Kodanda Ramachandra Moorthy". It is a gift not to a specified idol but to the Almighty Sri Kodanda Ramachandra Moorthy. This distinguishes the present case from the case where the grant is made to a particular idol installed in a particular temple. In *Pallayya* v. *Ramavadhanulu* (1) it was held by Benson and Bhashyam Aiyangar, JJ., that a declaration of trust in relation to immoveable property for a public religious purpose is not governed by the Indian Trusts Act, which by S. 1 declares it inapplicable to religious trusts. It was also held that S. 123 of the Transfer of Property Act has no application to dedication of land to

1. (1903) 13 M L J 364. 2. (1922) I L R 46 M 373: 44 M L J 745 (P C)

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the public as the section only applied to cases when the donee is an ascertained or ascertainable person by whom or on whose behalf a gift can be accepted or refused. There seems to be a slight verbal error in this report. I think that having regard to the document set out in the beginning of the report the words in the judgment should be "the gift of land to the idol and dedication of the temple to the public" instead of "dedication of the idol and land to the public". Otherwise there will be the inconsistency pointed out by the Chief Justice in the referring order.

In *Ramalinga Chetti* v. *Sivachidambara Chetty* (3) it was held by Seshagiri Aiyar and Phillips, JJ., that the dedication of property to an idol of a temple is not required by law to be in writing and may be made orally. In *Tammi Reddi* v. *Gangi Reddi* (4), Spencer, J., and myself agreed with the view taken in *Ramalinga Chetti* v. *Sivachidambara Chetty* (3) and held that no document was necessary for the dedication of property to charity.

We have not been referred to any case where it has been held that an oral gift for a religious purpose requires registration. In this connection I may point out that S. 123 of the Transfer of Property Act only applies to transfers by one living person to another. S. 5 of the Act runs as follows:—

"In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and 'to transfer property' is to perform such act."

It is difficult to see how a gift to God Sri Kodanda Ramachandra Moorthy can be a gift to a living person.

It has been argued for the respondent that an idol is in law recognised to be a juristic person capable of holding property and it must be held that a gift to an idol is a gift to a living person. A juristic person is not necessarily a living person, and the fact that for some purposes the law by a fiction invests non-animate bodies with the rights of persons would not make juristic persons living persons for all purposes. It is unnecessary to pursue this point further as the document is not a gift to an idol but to Sri Kodanda Ramachandra Moorthy the Almighty, and by no stretch of imagination, legal or otherwise, can it be said that the Almighty is a living person within the meaning of the Transfer of Property Act. I see no

3. (1918) I L R 42 M 440: 36 M L J 575.
4. (1921) I L R 45 M 281: 42 M L J 570.

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reason to differ from the Madras cases cited above where the law has been settled for several years. I think the principle of *stare decisis* should be applied unless there are strong reasons to the contrary as otherwise it would unsettle many titles.

I am of opinion that Ex. I does not require registration even if it confers any present title as it is a religious trust exempted by S. 1 of the Trusts Act. If it is treated only as referring to a past gift, the Transfer of Property Act has no application to the gift as it is a gift in favour of the Almighty and could be validly created without any document.

Although the case for the plaintiff was that the transaction was in fraud of creditors, no attempt was made to prove it before the District Munsif who finds that the gift was a perfectly *bona fide* one. This finding is not disputed before us. I am of opinion that the appeal should be allowed and the decision of the Subordinate Judge reversed and that of the District Munsif restored with costs throughout.

In this judgment the Chief Justice concurs.

Reilly, J.

Reilly, J. :—I agree that the suit should be dismissed with costs throughout and that Ex. I does not require registration either as an instrument of trust or as a gift deed. The trust to which it relates is a religious trust. The gift to which it refers appears to have been made otherwise than by Ex. I; and, if it were intended to be made by Ex. I, then as it was not a gift to a 'living person' within the meaning of S. 5 of the Transfer of Property Act, the document would not require registration.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE DEVADOSS.

The Official Assignee of Bombay ... *Appellant** (*2nd Deft.*)

v.

Obla Kuna Muna Sundarachari
and others ... *Respondents* (*Plaintiffs* 1 *to* 4 *and* 4*th Defendant*).

The Official Assignee of Bombay v. Sundarachari.

Presidency Towns Insolvency Act, S. 55—Voidability of mortgage by insolvent under—Jurisdiction to decide upon—Insolvency Court—Other Courts—Jurisdiction of—Provincial Insolvency Act, S. 53—Voidability of transaction under—Jurisdiction to decide upon.

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*Appeal No. 85 of 1925. 16th February, 1927.

The Official Assignee of Bombay v. Sundarachari.

Under the Provincial Insolvency Act, no Court except an Insolvency Court having jurisdiction can declare a transaction voidable under S. 53 of that Act.

The same principle applies to the case of a transaction impeached under S. 55 of the Presidency Towns Insolvency Act, so that any question as to the voidability of a transaction in so far as it is raised by the Official Assignee under the special provisions of that Act has to be determined by the Court constituted by that Act which would have jurisdiction to determine that question. Ss. 55 and 56 of that Act are special provisions relating to insolvency and it is only in insolvency that transactions can be impeached as voidable if they do not fall under S. 53 of the Transfer of Property Act.

In a suit brought in a Subordinate Court to enforce a mortgage executed by a person who was adjudicated an insolvent by the Bombay High Court within two years of the execution of the mortgage, the Official Assignee of Bombay pleaded, *inter alia*, that the mortgage was void against him under S. 55 of the Presidency Towns Insolvency Act. It was found that the mortgage was executed for consideration and was not *benami* for the mortgagor.

Held that, in such a suit, neither the Subordinate Judge nor the High Court in appeal from him, had jurisdiction to go into the question whether the transaction was void against the Official Assignee under S. 55 of the Presidency Towns Insolvency Act, and that the suit must be decreed with liberty to the Official Assignee to apply to the Bombay High Court to set aside the mortgage under S. 55 of the Presidency Towns Insolvency Act.

Appeal against the decree of the Court of the First Additional Subordinate Judge of Madura in O. S. No. 11 of 1923 (O. S. No. 201 of 1922 on the file of the Court of the Subordinate Judge of Madura).

The Advocate-General (*T. R. Venkatarama Sastriar*) and *K. Bhashyam Aiyangar* for appellant.

C. V. Ananthakrishna Aiyar for respondents.

The Court delivered the following

JUDGMENT :—This appeal arises out of a suit to recover Rs. 27,666-6-9 with costs and further interest alleged to be due on a mortgage executed on 1st November, 1921 by the 1st defendant in favour of the plaintiffs. The first defendant was adjudicated an insolvent in the Bombay High Court in March, 1922. The date of adjudication does not appear, but it was some time between the 7th and the 15th of March, 1922. The Official Assignee of Bombay is the 2nd defendant in the suit. The 3rd defendant, the Madura Mills Company, were the lessees of the mortgage properties; but their lease expired and they have disclaimed all interests, so that it is unnecessary to consider them any further.

First defendant died after suit and his widow has been brought on record as his legal representative. The Official Assignee who contested the suit raised several defences. The first was that no money was due on the mortgage as no consideration was paid. The second was that the mortgage was executed really *benami* for the first defendant (insolvent) and therefore conferred no right on the plaintiffs. In paragraph 7 of his written statement it was stated that the first defendant was adjudicated an insolvent in the Bombay High Court and that the mortgage, having been executed within two years prior to adjudication and not being *bona fide* and without any consideration, is void as against the Official Assignee under S. 55 of the Presidency Towns Insolvency Act. Paragraph 8 runs as follows:—

"Some of the creditors of the insolvent have moved this defendant to apply to the Bombay High Court under the abovesaid section for getting the suit hypothecation deed annulled, and this defendant intends to apply under the above section as soon as possible as the Bombay High Court has re-opened on the 8th January, 1922 after the Christmas holidays."

Paragraph 9 is as follows:—

"As this defendant intends to make an application to the Bombay High Court under S. 55, this defendant prays that this Court may be pleased to post this suit to a date two months hence so as to enable this defendant either to get it stayed till the disposal of the application or to get it transferred to the Bombay High Court to be tried along with the application."

No application was made. The issues raised were :—

1. Is the plaint bond true, valid and supported by consideration? or
2. Is it only a nominal transaction intended to defraud 1st defendant's creditors?
3. To what relief, if any, are plaintiffs entitled?

The Subordinate Judge on a careful consideration of the evidence and the accounts filed came to the conclusion that the plaint mortgage was fully supported by consideration and that it was not a nominal transaction intended to defraud first defendant's creditors. No issue was raised as to whether, even if there was consideration, the transaction could be void as falling within S. 55 of the Presidency Towns Insolvency Act, being within two years of the adjudication and not being *bona fide*, probably because this matter was reserved, as mentioned in the written statement, to the Bombay High Court. The Subordinate Judge having found that the transaction was not *benami* and was for consideration, considered the provisions of law applicable in the suit as framed before him whether, under S. 53

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of the Transfer of Property Act, on the finding that there was consideration, the fact that preference was given to one creditor over another would make the transaction void or voidable in a suit between the mortgagor and the mortgagee. He relied on the decision of the Privy Council in *Musahar Sahu* v. *Lala Hakim Lal* (1). On appeal the learned Advocate-General did not argue that the document was not supported by consideration. The only point as regards consideration which he said was suspicious and which requires scrutiny was Item 10. As regards this item, the Subordinate Judge deals with it at page 19 of his judgment. The account book of the mortgagee and the day book and ledger of the mortgagor agree as regards the amount, but the way in which the money was appropriated differs. We cannot on these circumstances alone, without any further evidence and also in view of the fact that there was a settlement of accounts which is not impeached before us hold that this item has been proved. Admittedly the amount was received and a difference in the entries between the book of the mortgagor and that of the mortgagee would not make the debt not due. For the purpose of the appeal we have to treat it on the footing that this document is fully supported by consideration. If the case was to be decided under S. 53 of the Transfer of Property Act without reference to the Insolvency Act, we think the Subordinate Judge was right in holding that the transaction could not be said to be void on the ground that it was intended to defeat or defraud creditors. All we can hold on the evidence is that one creditor was more diligent than others in getting a security for the money due to him. The main ground of the argument put forward by the learned Advocate-General was that the Subordinate Judge was wrong in thinking that the question of *bona fides* ought to be decided only with reference to the Transfer of Property Act and not with reference to S. 55 of the Presidency Towns Insolvency Act. His argument is that in dealing with the question with reference to the Insolvency Act we must take all the circumstances into consideration, and we must see whether the man was at that time really in involved circumstances unable to meet his debts and whether this is not a transaction which is a fraudulent preference in favour of one creditor putting the property out of reach of the general body of creditors in favour of one who had at the date of transaction no special reason for getting the preference. He points out that it is not

1. (1915) I L R 43 C 521: 30 M L J 116 (P C).

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shown that any money was borrowed for the purpose of the business to be conducted, that the actual lending of the money stopped at the settlement of the accounts in 1919, that subsequently till we come to the date of the transaction we find only interest being credited in the book and then on the date of the transaction a small sum of Rs. 500 is shown as paid in cash for the bond and Rs. 150 for the stamp expenses and that there is no evidence that this Rs. 500 was paid for any business or anything that would indicate the *bona fides* of the transaction. He also points out that admittedly there were other dealings between the mortgagor and the mortgagee which on the books produced in Court showed that monies were due by the mortgagee to the mortgagor at the date of the execution of the mortgage. No doubt these sums were unascertained and had to be ascertained by looking into the accounts. But he points out that between 1919, the date of the settlement, and the date of the mortgage there was ample time to look into the accounts especially as dealings stopped shortly after 1919 and that where a person who is unable to pay his debts chooses to execute a mortgage in favour of one creditor without looking into the accounts which show that some amount is due to him from the creditor and without setting off the amount due to him against the amount due by him, the transaction could not be *prima facie* said to be *bona fide* especially when the mortgagee was a partner with the plaintiff with regard to the unsettled accounts.

It is argued by Mr.C.V.Ananthakrishna Aiyar for the respondent that considerations based upon the voidability of a transaction under S. 55 of the Presidency Towns Insolvency Act cannot be gone into by any Court except an Insolvency Court constituted under the Presidency Towns Insolvency Act and the Subordinate Judge had no jurisdiction to declare the transaction voidable under S. 55. We are of opinion that this argument is well founded. So far as the decisions under the Provincial Insolvency Act are concerned it has been held that no Court except an Insolvency Court having jurisdiction could declare a transaction voidable under S. 53 of the Provincial Insolvency Act. This is clear from the decision in *Mariappa Pillai* v. *Raman Chettiar* (2) and the decision in *The Official Receiver, Coimbatore* v. *Palaniswami Chetti* (3). The latest decision, *The Official Receiver, Coimbatore* v. *Palaniswami Chetti* (3), goes so fully into the question that it is unnecessary for us to do

2. (1918) I L R 42 M 322.
3. (1925) I L R 48 M 750: 49 M L J 203.

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anything further than to refer to the decision as laying down the law on the subject so far as the Provincial Insolvency Act is concerned. Our attention was drawn to an unreported decision in S. A. No. 360 of 1916; but this decision was dissented from in *Mariappa Pillai* v. *Raman Chettiar* (2) and, we are not prepared to follow it. The question therefore is whether the same principle has to be applied when the case falls under the Presidency Towns Insolvency Act.

The main argument of Mr. Bhashyam Aiyangar is that in S. 53 the concluding words are:

"be voidable as against the Receiver and may be annulled by the Court".

and S. 54 also contains the words

"be deemed fraudulent and void as against the Receiver, and shall be annulled by the Court"

whereas in S. 55 of the Presidency Towns Insolvency Act the words are

"be void against the Official Assignee"

and in S. 56 the words are also

"and void as against the Official Assignee."

He argues that as the words are different, the two sections 55 and 56 can only be declaratory leaving the jurisdiction unaffected thus enabling him to raise the question in all Courts when he wants to avoid a transaction specified in those two sections. He refers us to *Ramaswami Chettiar* v. *Mallappa Reddiar* (4) which is a Full Bench decision of this Court dealing with S. 53 of the Transfer of Property Act where it was held that a representative suit was not necessary and the right was retained to any creditor if the case fell within the scope of that section and that same principle has to be applied to a case under the Insolvency Act. We do not think that the omission of the words "may be annulled by the Court" in Ss. 55 and 56 makes any difference in dealing with the provisions of the Presidency Towns and Provincial Insolvency Acts. We cannot distinguish the two decisions *The Official Receiver, Coimbatore* v. *Palaniswami Chetti* (3) and *Mariappa Pillai* v. *Raman Chettiar* (2) on this ground. The Presidency Towns Insolvency Act constitutes a special tribunal or forum for the determination of questions arising under the Act. The Courts having jurisdiction in insolvency under this Act are the High Courts of Judicature at

2. (1918) I L R 42 M 322.
3. (1925) I L R 48 M 750: 49 M L J 203.
4. (1920) I L R 43 M 760: 39 M L J 350 (F B).

Raja Venkata-ramayya v. Kamisetti Ghattayya.

of attestation and that the plaintiff's attention was not called to the necessity of his proving that the attestors to the mortgage document saw the executant signing.

It was held by a Bench of this Court in *Rangasami Aiyangar* v. *Veeraraghavachariar* (1) that such an objection should not be allowed to be taken for the first time in the Appellate Court. There was, however, an issue here (Issue 2) whether the plaintiff's mortgage was valid and binding on defendants 2 and 3; and upon this issue the District Munsif considered the question as to validity of the attestation and decided it in plaintiff's favour as the writer of the document had seen the mortgagor sign and his statement that the attesting witnesses did not sign in his presence was not believed. It does not follow from this statement, even if it is true, that the attestors did not see the mortgagor sign. If they were present on the spot they may have seen the mortgagor sign, and if the writer signed first, as he says he did, he may have left the place before their signatures were taken. The writer does not say they were not at all present when the document was executed.

The attestors are both said to be now dead. S. 69 of Evidence Act provides for the manner of proving documents when the attestors are dead. As there was no clear issue in the first Court upon the point of attestation the plaintiff must now be given an opportunity of examining any witnesses who can prove the signature of the attesting witnesses, and the defendants will be permitted to adduce rebutting evidence if they have any.

After this evidence has been recorded the District Judge should record a fresh finding upon the question whether the plaint mortgage was duly attested.

As his judgment indicates that he is inclined to differ from the District Munsif on the question whether the transaction was not a colourable one got up to defeat a prior mortgagee, which was the defence put forward in paragraph 4 of the written statement of defendants 2 and 3, the District Judge will also record a finding upon this question upon the evidence on record.

Two months for finding and 10 days for objections.

In compliance with the above order the District Judge of Anantapur submitted the following

1. (1923) 46 M L J 56.

Raja Venkataramayya v. Kamisetti Ghattayya.

FINDING :—(1) Whether the plaint mortgage was duly attested?

(2) Whether the mortgage was not a colourable one got up to defeat a prior mortgagee?

All things considered, I am of opinion that the attestors did witness the execution and that the deed was properly attested. The attestation was not disputed in the written statement. This issue is, therefore, found in the affirmative.

2nd Issue :—In the absence of reliable evidence to show that the mortgage under Ex. A was without consideration, I do not consider that the probabilities of the case warrant my coming to a conclusion that Ex. A was not intended to convey what is purported to convey. It is accordingly found that the transaction was not a colourable one got up to defeat a prior mortgagee.

This second appeal coming on for final hearing after the return of the finding of the Lower Appellate Court upon the issues referred by this Court for trial, the Court delivered the following

JUDGMENT :—I accept the findings. All the parties to the document are dead but one and it has been found that he gave false evidence. The handwriting of the attestors has been proved and this presumption, in the absence of rebutting evidence, is that they actually witnessed the execution of the deed—vide *Uttam Singh* v. *Hukam Singh* (2).

The second appeal is allowed with costs in this and in the Lower Appellate Court.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Muthuswami Pillai ... *Appellant** (*1st Deft.*)

v.

Sandana Velan and others ... *Respondents* (*Defts.*)

Muthuswami Pillai v. Sandana Velan.

Transfer of Property Act, S. 43—Hindu father—Sale by—Increase of share of father between date of sale and that of purchaser's suit for possession—Purchaser's right to—Conditions—Hindu Law—Father—Sale of family property for purchasing other property—If and when beneficial to family—Co-parcener—Sale by—Purchaser's suit for possession—Allotment of alienated property to alienor's share—Equity of—Conditions

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*S. A. No. 1092 of 1923. 20th December, 1926

2. (1916) I L R 39 A 112.

Muthuswami Pillai v. Sandana Velan.

A Hindu father executed a sale deed, purporting to do so on behalf of himself and his two minor sons. In the description of the property sold it was stated that the same had been purchased by the father out of his self-earnings and was in his possession and enjoyment.

Held, that the father must be deemed to have represented that he was authorised to sell the whole property and that the transferee must be deemed to have accepted the sale on that representation within the meaning of S. 43 of the Transfer of Property Act.

One of the minor sons died between the date of the sale deed and that of the purchaser's suit for possession of the whole property purchased. *Held,* therefore, that the purchaser, under S. 43 of the said Act, was entitled to a half-share of the property, although at the date of the sale he was only entitled to the father's one-third share.

A sale by a Hindu father of family land for the purpose of purchasing another land would clearly be for the benefit of the family, if the land intended to be purchased was a better land or more convenient for cultivation

N. B.—In this case there was in fact no purchase of other land at all, and yet the Lower Court submitted a finding that the sale was calculated to benefit the family, and that finding was accepted by the High Court.

An alienee from a coparcener will be entitled to insist upon the equity of having the alienated property allotted to the share of his alienor only if he brings a suit for a general partition, and even then, only if the alienor's share in a general partition would at least be equal in value to the value of the alienated property

Second appeal against the decree of the Court of the Additional Subordinate Judge of Madura, dated 28th July, 1922 in A. S. No. 64 of 1921 (A. S. No. 151 of 1921 on the file of the District Court of Madura) preferred against the decree dated 23rd September, 1920 of the Court of the District Munsif of Melur in O. S. No. 170 of 1919.

K. B. Ranganatha Aiyar for appellant.

P. R. Ganapathi Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The 1st defendant sold the plaint land for a sum of Rs. 2,000 purporting to act for himself and his minor sons. In the description of the property it was stated that the land had been purchased by the 1st defendant out of his self-earnings and was in his possession and enjoyment. Rs. 100 out of the sale price was paid at the time of the execution of the sale deed. The plaintiff brought this suit for recovery of possession of the suit property and made the 1st defendant and his two minor sons parties to the suit. The District Munsif dismissed the suit. On appeal the Subordinate Judge gave the plaintiff a decree that he was entitled to a half share of the suit property and symbolical possession of the same on con-

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dition of his depositing Rs. 900 which represented the balance due for the price of half the property. The 2nd defendant had died during the appeal. It was therefore held by the Subordinate Judge that the plaintiff, under S. 43 of the Transfer of Property Act, was entitled to a half share of the property although at the date of sale he was only entitled to the 1st defendant's share which was one-third of the whole.

In appeal it is contended that S. 43 is not applicable to this case. The question is whether the 1st defendant represented that he was authorised to transfer the whole property and whether the transferee accepted the sale on that representation. There can be no doubt from Ex. A that the 1st defendant did purport to sell the whole property on behalf of himself and that the recital therein that he has purchased the property out of his self-earnings was in order to make the purchaser believe that he was getting a good title to the property. It is no indication that what was sold was less than the whole property. This is the only point argued in the second appeal for the appellant which, therefore, fails.

In the memorandum of objections it is urged that the plaintiff is entitled to get a decree for the whole property if he can show (1) that the sale was for a purpose beneficial to the family to which the minors belong, or (2) if upon a partition the suit land can be allotted to the father's share. Upon this point the learned Subordinate Judge has only considered whether the purpose of the sale as stated by the plaintiff's fourth witness constituted a binding necessity. He has not considered whether the sale of this land which was said to be sold in order to purchase another land could not be for the benefit of the family. If the land that was intended to be purchased was a better land or more convenient for cultivation, it would clearly be for the benefit of the family that the suit land should be sold and another land purchased in place of it. Upon this point the parties have not realised what they have to prove and there is very little evidence on the point. The 3rd defendant who is a minor and is now represented by his mother has not appeared to contest this appeal or the memorandum of objections. We must therefore call for a finding from the Subordinate Judge upon the evidence on record and such other evidence as the parties may adduce whether the sale under Ex. A was an act calculated to benefit the family of the 1st

defendant and his sons. The present suit cannot be converted into one for general partition. Upon the alienee bringing a suit for general partition the equity between the parties will have to be worked out, but he will not be entitled to get the suit property allotted to the share of the 1st defendant unless the 1st defendant's share in a general partition is at least equal in value to the value of the alienated property. The Subordinate Judge will therefore report approximately what is the net value of the whole property of the joint family of defendants 1 and 3. Findings to be returned within one month after the re-opening of the Lower Appellate Court after the summer vacation. 10 days for objections.

In compliance with the order contained in the above judgment, the Subordinate Judge of Madura submitted the following

FINDING :—Viz., whether the sale under Ex. A was an act calculated to benefit the family of the 1st defendant and his sons and they have called for a report on the point, viz., (2) what is the net value of the whole property of the joint family of defendants 1 and 3.

1. It is stated on the plaintiff's side that the sale was executed by the 1st defendant in order to purchase some other land of superior quality and higher value. The suit lands are said to be waste lands without any source of irrigation and the soil also is said to be saline. The evidence shows that the sale was executed with the idea of purchasing lands of a better quality and of a higher value and the question is whether the sale with that intention but without really purchasing the other lands would benefit the minors. In fact there was no purchase and the minors were not benefited by it. But the wording of the issue is whether the sale was an act calculated to benefit the family. It was no doubt calculated to benefit the family and I find the point accordingly.

2. No evidence was let in to show the net value of the properties in the possession of the defendants' family but the evidence shows that the family had 10 or 11 acres and the lands that were not sold are superior in value and larger in extent than the portion sold. There are only two sharers in the family and the portion sold is less than a half and also much inferior in value to the portions unsold. I find this point accordingly.

Muthuswami Pillai v. Sandana Velan.

This second appeal and the memorandum of objections coming on for final hearing after the return of the above finding and report the Court delivered the following

JUDGMENT :—We accept the finding and the memorandum of objections will be allowed with costs here and in the Lower Appellate Court. There will be only one vakil's fee for both the appeal and for the memorandum of objections. The plaintiff will be given a decree for the suit property on payment of Rs. 1,900 into Court to be paid to defendants 1 and 3 in one month from this date. There will be no interest or mesne profits. If the money is not paid by the time allowed, plaintiff's suit will stand dismissed with costs.

A. S. V. ——— *Appeal dismissed : Memo. of Objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Aiyya Mudali Velalan ... *Appellant** (*Plaintiff*)

v.

Sourimuthu Odayan and another ... *Respondents* (*Defts.*).

Aiyya Mudali Velalan v. Sourimuthu Odayan.

Madras Estates Land Act, Ss. 112, 189—Sale of holding—Suit to contest landlord's right of sale, on ground of failure to tender patta, under Part A, 12 of Act—Failure to institute—Civil Court—Jurisdiction of, to entertain such a plea—S 189 of Act—Effect.

Whether a patta had been tendered is a matter in respect of which a suit might be brought under S. 112 of the Madras Estates Land Act. A ryot upon whom notice is served under that section, and who contests the landlord's right of sale on the ground that a patta had not been tendered must bring a suit under the Schedule to the Madras Estates Land Act (Part A, 12). If he fails to do so, S. 189 will bar the jurisdiction of the Civil Court to entertain such a plea.

Second Appeal against the decree of the Court of the Subordinate Judge of Tanjore in A. S. No. 137 of 1923 preferred against the decree of the Court of the District Munsif of Pattukottai in O. S. No. 278 of 1920.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for appellant.

T. R. Sreenivasarajagopala Aiyangar for respondents.

The Court delivered the following

JUDGMENT :—Plaintiff bought certain land under S. 124, Madras Act (I of 1908). When he attempted to take possession the 1st defendant the ryot whose holding was sold obstructed him. Hence the suit. The first defendant pleaded that the sale was irregularly conducted. The issue 2 (*b*) was accord-

*S. A. No. 776 of 1924. 16th February, 1927.

Aiyya Mudali Velalan v. Sounmuthu Odayan.

ingly framed. Was the rent sale held regularly and properly as required by law? In para. 8 of his judgment the District Munsif found that there was no irregularity, in fact nothing specific was alleged. On appeal the Subordinate Judge propounded to himself an issue whether the landlord had tendered a patta as required by S. 53 of the Act. He was fully aware that this issue was not raised by the defendant, because for that very reason he refused the 1st defendant his costs. In any case the suit would have to go back for an amendment of the written statement and a fresh trial upon the new issue of fact, and it is amazing that the Lower Appellate Court did not realize this before pronouncing final judgment.

But it is first necessary to determine whether a ryot upon whom notice is served under S. 112, and who institutes a suit contesting the landlord's right of sale, and fails in that suit, can bring another suit under the Civil Procedure Code pleading the same defect in the landlord's right. Of course there is no question of *res judicata.* The ordinary civil jurisdiction will only be barred, if at all, under S. 189 of the Act read with Part A of the Schedule. A suit to contest the right of sale of a holding under S. 112 (Item 12 in Schedule A) is triable under S. 189 by a Collector, and no Civil Court shall take cognizance of any matter in respect of which such suit might be brought. Whether a patta had been tendered is a matter in respect of which a suit might be brought under S. 112. But the respondent maintains the extreme view that a ryot may bring a suit upon that matter under S. 112, fail, and after the sale of the property, bring another suit upon the same matter, because the suits are so far different that in one suit he sues to prevent, and in the other suit to cancel, a sale, although otherwise both suits proceed upon the same cause of action. He relies upon *Rajah of Ramnad* v. *Venkataramaiyer* (1). The reference to the Full Bench in that case is very wide.

Has a Civil Court jurisdiction to entertain a suit by a ryot to set aside a sale of his holding which was held under the provisions of Chapter VI of the Madras Estates Land Act. The Full Bench noted the argument that a suit under S. 112 might attract the mischief of S. 189 so as to bar the jurisdiction of the Civil Court, and observed that the suit out of which the reference arose was nothing of the kind; because in that case no notice as required by S. 112 had ever been given. The

1. (1922) I L R 45 M 890 at 899 : 43 M L J 264 (F B).

Aiyya Mudali Velalan v. Sourimuthu Odayan.

question resolved itself into one whether a ryot who alleged that his holding had been unlawfully sold, and had never been given an opportunity of availing himself of a remedy under the Act could sue in the ordinary Civil Courts. "That being so" the Bench answered the reference in the affirmative. Therefore this ruling is not authority for the very question which it propounded but did not answer, whether the fact that a remedy lay by summary suit to prevent the sale would bar a subsequent civil suit to set it aside.

On the facts of the present case, *Irulappan Servai* v. *Veerappan* (2) is clear authority against the contention of the respondents. This is the case mentioned by the referring Judges in *Rajah of Ramnad* v. *Venkataramaiyer* (1).

I therefore find that the defendants had no valid defence on this point under S. 53, even if they had raised it which they did not do.

The judgment of the learned Munsif is restored with costs throughout. The decree of the Lower Appellate Court is reversed.

A.S.V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Erechamveettil Parkum Koottayi Chathukutty ... *Appellant** (*Plaintiff*)

v.

Changanatha Parkum Thottathil Kunhappu and another ... *Respondents* (*Defendants*).

Koottayi Chathukutty v. Thottathil Kunhappu.

Malabar Compensation for Tenants' Improvements Act (I of 1900), Ss 3, 4—Tenant within meaning of—Tenant of a shop if a.

Madras Act (I of 1900) applies to agricultural holdings and to what are known as *kudiyiruppu* or vacant site available for buildings and does not apply to sites which are already mainly occupied by houses or shops. A tenant of a shop in Malabar does not come within the purview of the Act.

Second Appeal against the decree of the District Court of North Malabar in A. S. No. 270 of 1922 preferred against the decree of the Court of the District Munsif of Nadapuram in O. S. No. 1190 of 1920.

K. V. Madhavan Nair, A. V. K. Krishna Menon and *K. Kuttikrishnan Menon* for appellant.

A. K. Balakrishnan for respondents.

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*S. A. No. 963 of 1924. 8th February, 1927.

1. (1922) I L R 45 M 890 at 897 : 43 M L J 264 (F B).

2. (1921) 42 M L J 113.

Koottayi Chathukutty v. Thottathil Kunhappu.

The Court delivered the following

JUDGMENT :—Second Appeal against the judgment and decree of the District Judge of North Malabar in A. S. No. 270 of 1922 made in O. S. No. 1190 of 1920 on the file of the District Munsif of Nadapuram.

The short point for determination in this appeal is whether the tenant of a shop in Malabar comes within the purview of Act I of 1900, Madras. Curiously enough the question appears to be *res integra*. Although it must have been decided times without number in the Lower Courts, nevertheless, there is no ruling of this Court in the matter. In S. 3, 'tenant' is defined as including a person who is lessee of land. 'Holding' in sub-section (3) of S. 3 has no larger connotation than is implied by the language of sub-section (1). Improvements are set forth in S. 4 and there is nothing in that list which could include the improvement of urban dwellings. I think it is entirely foreign to the intention of the Act to hold that because a house or a shop must necessarily stand upon land therefore whenever a house or shop is leased the tenant is lessee of land within the meaning of the Act and if there happen to be some small yard appurtenant to the shop that would make no difference. I think it has invariably been held in Malabar that the Act applies to agricultural holdings and also to what are known as *kudiyiruppu* or vacant site available for buildings and does not apply to sites which are already mainly occupied by houses or shops. It follows therefore that the respondent in this appeal can derive no benefit from the provisions of the Act and he must be held to the terms of his contract, Ex. C, by which he has undertaken to remove the oven, I do not know why the translator of this Court should call it a bread safe, at the expiry of his lease. The appeal is accordingly allowed and the decree of the District Munsif is restored with costs throughout.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Adusumilli Gopalakrishnayya and another ... *Appellants** (*Respondents*)

v.

Battula Venkataswami ... *Respondent.*

Gopalakrishnayya v. Battula Venkataswami.

Judicial Committee Act, 1833 (3 *and* 4 *William IV, Chap.* 41), *S.* 23—*Privy Council Appeal—Death of one respondent pending hearing of the appeal—Legal representatives not brought on record—Effect—Consolidation of appeals—Death of a respondent in one appeal—Legal representative not brought on record—Effect.*

Where pending the hearing of a Privy Council appeal one of the respondents died and the legal representatives were not brought on record, the decision in the appeal is not a nullity so far as the dead man is concerned but can be executed against his legal representative by the Courts in India.

Kalyani Pillai v. *Thiruvenkadaswami Aiyangar,* (1924) I L R 47 M 618: 47 M L J 154 followed.

Where the Privy Council consolidated three cases into one appeal and heard a joint argument as regards all the cases, and the respondent in one of the appeals died pending the hearing of the appeal, the decree can be executed against the legal representative of the deceased person in spite of the fact that the legal representative was not brought on record at the time of the hearing of the appeal.

Gopalacharyulu v. *Subbamma,* (1919) I L R 43 M 487: 38 M L J 493 referred to.

Appeals against the orders of the District Court of Kistna at Masulipatam dated the 5th day of February, 1923, in A. S. Nos. 126, 128 and 129 of 1922 respectively and appeal against the order of the Court of the Subordinate Judge of Masulipatam in A. S. No. 53 of 1924 (A. S. No. 222 of 1924) on the file of the District Court of Kistna at Masulipatam preferred against the orders of the Court of the District Munsif of Gudivada in E. P. No. 364 of 1921—O. S. No. 272 of 1909, E. P. No. 366 of 1921 in P. C. Appeal No. 55 of 1916 in O. S. No. 275 of 1909, E. P. No. 366 of 1921 in O. S. Nos. 271, 272 and 275 of 1909, Additional District Munsif's Court, Bandar and P. C. Appeal No. 55 of 1916—O. P. No. 16 of 1923 (O. S. No. 272 of 1909, Bandar District Munsif's Court) respectively.

Ch. Raghava Rao for *A. Krishnaswami Aiyar* for appellant.

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*C M S A Nos. 31, 32, 53 of 1924 and 32 of 1925. 7th January, 1927.

Gopalakrishnayya v. Battula Venkataswami.

Krishnan, J.

S. Varadachariar for *P. Satyanarayana Rao* for 1st respondent.

The Court delivered the following

JUDGMENTS:—*Krishnan, J.* :—The facts out of which this Second Appeal arises are as follows:—The appellants who are landlords brought three suits, O. S. Nos. 271, 272 and 275 of 1909 against various tenants for ejectment. They originally filed the suits in the District Munsif's Court, but the High Court finally held that the suits were not filed in the proper Court which was the Revenue Court and directed the plaints to be returned for presentation to the proper Court. There was an appeal to the Privy Council, Appeal No. 55 of 1916, in which the three cases were consolidated into one appeal. The decision of the Privy Council is reported in *Suryanarayana* v. *Patanna* (1). We are not concerned in the present proceedings with the reasons of the Privy Council nor with their ruling itself. It would seem that pending the hearing of the Privy Council appeal, one Seshayya, defendant in O. S. No. 272 of 1909 died, and no legal representative was brought on record and the decision of the Privy Council was given without anybody representing Seshayya's interests on record before them. It is now argued by his legal representative, Venkataswami, who is the respondent before us, that this decision so far as his case is concerned, is a nullity as nobody represented his interests and as it was given against a dead man. The District Judge has given effect to this contention and disallowed execution against Venkataswami, Seshayya's legal representative.

On appeal it is brought to our notice that the case is exactly covered by the ruling of this High Court in *Kalyani Pillai* v. *Thiruvenkadaswami Aiyangar* (2) which followed the ruling of the Patna High Court in *Deonandan Prasad Singh* v. *Janki Singh* (3). These two decisions are based upon 3 and 4 William IV. c. 41, s. 23. That section seems to be fairly clear that even though a party before the Privy Council might have died pending the appeal the order made by the Privy Council in the case nevertheless has full force and effect and is to be carried out by the Courts in India. It is enacted:

"That in any case where any order shall have been made on any such appeal as last aforesaid, the same shall have full force and effect notwithstanding the death of any of the parties interested therein."

1. (1918) I L R 41 M 1012: 36 M L J 585 (P C).
2. (1924) I L R 47 M 618: 47 M L J 154.
3. (1920) 5 Pat. L J 314.

Gopalakrishnayya v. Battula Venkataswami.

Krishnan, J.

The second part of that section is not relevant here. It is ingeniously suggested by the learned vakil for the respondent that there is some misapprehension as to the meaning of this section by both the Madras High Court and the Patna High Court and that S. 23 should be read with S. 21 which talks about "Order and Decree" and he contends that S. 23 will not apply in the case of a decree as that section talks only about an "Order". I am unable to follow this argument. What we are carrying out here is the order of the Privy Council. The wording is:

"His Majesty having taken the said report into consideration was pleased by and with the advice of his Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed, obeyed and carried into execution.

Whereof the Judges of the High Court of Judicature at Madras for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly."

The order has full force in spite of the fact that when that order was made, one of the parties affected by that order was not alive and we are bound to carry out that order. It follows then that the fact that Seshayya was dead at the time of the hearing of the Privy Council Appeal is of no importance.

Furthermore, it must be remembered that the Privy Council consolidated the three cases into one appeal and heard a joint argument as regards all the cases. It was after hearing an argument like that that they decided the cases. The ruling in *Gopalacharyulu* v. *Subbamma* (4) is that where a decision is given in a suit instituted and conducted *bona fide* by some only of a number of persons similarly interested in the matter, it is *res judicata* against the representative of any defendant who had died pending the appeal but whose legal representative was not brought on record in the appeal or second appeal. No doubt that case dealt with the binding character of the decision on the persons who were the legal representatives of the deceased person and who were not brought on record and not exactly with the executability of the decree in the case. But the two are very analogous to each other. *Gopalacharyulu* v. *Subbamma* (4) could therefore also be relied on for the position that this decree could be executed against Venkatasami in spite of the fact that the person whose legal representative he is was not on record at the time of the hearing of the Privy Council Appeal.

4. (1919) I L R 43 M 487: 38 M L J 493.

Gopalakrishnayya v. Battula Venkataswami.

Krishnan, J.

C. M. S. A. No. 31 of 1924 must therefore be allowed and the order of the first Court restored.

C. M. S. A. No. 32 of 1924 follows.

C. M. S. A. Nos. 53 of 1924 and 32 of 1925 fail on the view we have taken and must be dismissed.

As regards costs, there will be costs for the appellants in C. M. S. A. No. 31 of 1924 and for the respondent in C. M. S. A. No. 53 of 1924. There will be no costs in the other two cases.

Odgers, J.

Odgers, J. :—I agree and I only wish to say one word as regards the first point raised by Mr. Varadachari as I was a party to the decision in *Kalyani Pillai* v. *Thiruvenkadaswami Aiyangar* (2). Nothing has been shown or said here to lead me to take a different view to that which I adopted in conjunction with Phillips, J., in that case, fortified as we were by the decision in *Deonandan Prasad* v. *Janki Singh* (3). The attempt to distinguish it on the ground of difference in language in Ss. 21 and 23 cannot, I think, be supported for a moment. There is nothing in the rest of the statute, as far as I know, that would lead one to the inference that the word "any order or decree" means anything different or is intended to have any different effect from the expression "any order" used in S. 23.

I agree with the order as to costs.

C. M. S. A. Nos. 31 and 32 of 1924 allowed

C. M. S. A. Nos. 53 of 1924 and 32 of 1925 dismissed.

N. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SRINIVASA AIYANGAR.

Narayanan, minor by next friend Palani Goundan ... *Petitioner* (Petr. Legal representative of the 4th Deft.)*

v.

Pappayi *alias* Karuppayi ... *Respondent (Respondent-decree-holder)*,

Narayanan v. Pappayi.

Civil Procedure Code, O. 21, R. 90—Person whose interests are affected by the sale—Meaning—Interest in the property sold if necessary.

The expression "affected by the sale" in O. 21, R. 90, Civil Procedure Code, should not be construed as if the words were "having an interest in

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*C R P No. 785 of 1925. 7th January, 1927.

2. (1924) I L R 47 M 618: 47 M L J 154. 3. (1920) 5 Pat. L J 314.

Narayanan v. Pappayl.

the property." A person who, by reason of the sale taking place or, in other words, by reason of the price fetched at the sale of the property, the sale of which is sought to be set aside, will be affected one way or the other, is a person "whose interests are affected by the sale" within the meaning of the rule.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the judgment and order of the District Court of Salem in A. S. No. 75 of 1925 preferred against the order of the Court of the District Munsif of Salem in E. A. No. 573 of 1924 in E. P. No. 177 of 1924 in O. S. No. 302 of 1921.

C. Krishnamachariar and *Selva Aiyangar* for petitioner.

S. S. Ramachandra Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The legal representative of the original 4th defendant judgment-debtor in this case is the petitioner before me. He applied to the Lower Court under the provisions of O. 21, R. 90 for setting aside the sale made by the Court of Items Nos. 2 and 3 under the decree. After the decree was passed, by a special decretal order, which is now admitted, the Court directed that Items Nos. 2 and 3 under the decree should be sold first and that it is only thereafter, if the sale proceeds thereof should be found insufficient to satisfy the decree, Item No. 1, of which the 4th defendant had become the purchaser after the suit mortgage, should be sold. The Lower Court without going into the merits of the application or the grounds on which the sale was sought to be set aside has dismissed the application on the mere preliminary ground that the petitioner was not a person entitled to apply for setting aside the sale within the meaning of R. 90. The expression used in that rule is that the application should be by a person who is entitled to share in the rateable distribution of assets or whose interests are affected by the sale. There is no question of the petitioner being interested in the rateable distribution in this case. The question then is whether he is or he is not a person whose interests are affected by the sale sought to be set aside. The learned vakil for the respondent argued that that expression should be construed as though it meant that the petitioner must have some interest in the property itself. It seems to me that such a contention cannot possibly be accepted and that such a construction would be wrong. When the legislature intended that the petitioner should have some interest in the property itself it has used very apt language such

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as either owning such property or holding an interest therein. R. 90 comes immediately after R. 89 and that difference in the terminology adopted between the two rules would almost seem to indicate that the different terminology was really deliberate and quite intended. The words being merely 'whose interests are affected by the sale' all that we have to do is to put to ourselves the question whether by reason of the sale taking place or, in other words, by reason of the price fetched at the sale of the properties, the sale of which is sought to be set aside, the petitioner is a person that will be affected one way or the other. It is clear in this case that, if the price realised by the sale of Items Nos. 2 and 3 should be low, to the extent to which it is low the person that would be directly affected by it would be not any other party to the suit but the 4th defendant or his legal representative. I do not see why the words should not be construed according to their obvious meaning and why full effect should not be given to the words as they stand. The learned vakil for the respondent no doubt put the question whether a mere creditor of the judgment-debtor can be regarded as a person interested in the sale, and it may be there are difficulties in the way of regarding a mere creditor of the judgment-debtor as a person whose interest will be affected by the sale. But the mere fact that a person is a creditor of a judgment-debtor is not sufficient to show that he would be affected by any sale of the property of the judgment-debtor. It depends upon circumstances. It depends upon the solvency of the judgment-debtor. It may depend upon various other matters. But the expression used by the legislature being 'interested' it must be taken to mean directly or immediately interested and even so construed it is clear that the 4th defendant's legal representative is a person that is directly interested and even immediately interested in the price realised by the sale and therefore a person directly and immediately affected by the sale. The learned vakil for the respondent has drawn my attention to the case of *Kathiresan Chettiar v. Ramaswami Chettiar* (1) where Sadasiva Aiyar and Napier, JJ., held that a mere decree-holder of the judgment-debtor could not be regarded as a person affected by the sale of the property within the meaning of R. 90. The decree-holder in that case had not even attached the property sought to be sold. At page 304, the learned Judges say as follows:—

1. (1914) 27 M L J 302.

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"We agree that it is a necessary limitation of the word "interests" to confine it to the property concerned as any other construction would open up an enquiry as to whether the appellant's pecuniary interests required satisfaction out of the property sold or whether there was other property available to him."

But the word 'interest' does not appear in this rule and the plain words of the rule are merely 'affected by the sale'. In any case the observation of the learned Judges was not necessary for the decision of the case before them. Mr. Krishnamachari for the petitioner has cited the case of *Dhirendra Nath Roy* v. *Kamini Kumar Pal* (2). The learned Judges in that case held that the expression "persons whose interests are affected by the sale" is one which is not limited to the persons whose proprietary or possessory title is affected by the sale. The learned Judges held that a creditor attaching the property of the judgment-debtor has such interest as would entitle him to apply under R. 90 of O. 21. It has frequently been held that mere attachment of property does not create any interest in the property and therefore it follows that the expression 'affected by the sale' should not be construed as if the words were 'having an interest in the property'. I am clearly of the opinion that the order of the Lower Court was wrong and I therefore set it aside and as the petition has been dismissed on a mere preliminary ground I send it back for being heard and disposed of according to law. The respondent will pay the petitioner's costs of this application.

A. S. V. —— *Order set aside*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[IN THE ORDINARY ORIGINAL CIVIL JURISDICTION.]

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Rajagopal Pillai ... *Plaintiff**

v.

P. Veeraperumal Pillai and four others ... *Defendants.*

Rajagopal Pillai v. Veeraperumal Pillai.

Hindu Law—Debts—Trade commenced by father—Debts contracted for trade, if 'avyavaharika' debts—Father contracting debts for discharging antecedent trade debts—Son when bound to pay—Reunion—Presumption against—Proof of—Bequest by father to son and bequest from stranger or collateral relation—Distinction between, as regards the nature of the property taken by devisee—Presumption as to joint family property

Debts incurred in a trade which is commenced by a Hindu father and which is not an ancestral trade are not 'avyavaharika' debts.

Achutaramayya v. *Ratnajee Bhootajee*, (1925) I L R 49 M 211 : 50 M L J 208 followed.

*C. S. No. 261 of 1926. 29th March, 1927.

2. (1924) I L R 51 C 495.

Where a Hindu father incurs debt for the purpose of discharging antecedent trade debts, his son is bound to pay it unless he proves that the antecedent debts are of an illegal or immoral nature. The fact that the antecedent debts arose out of trade cannot bring them within the description of immoral and illegal debts.

Under the Hindu Law, the presumption is against reunion. To establish it, it is necessary to show not only that the parties already divided lived or traded together but that they did so with the intention of thereby altering their status and to form a joint estate with all its usual incidents.

Where all that was proved was that one clerk was employed to collect rents from the properties belonging to the two parties, who had become divided and that the two parties lived and ate together for a short time after the partition, but it was admitted that there were dealings *inter se* between them and that each paid interest to, and accounted for the monies received from, the other and it was proved that each traded and dealt with the properties assigned to him in the partition separately.

Held, that the evidence was insufficient to show either that the partition was a mere sham or that there was a subsequent re-union.

Where a bequest or gift is made by a Hindu father in favour of his son, the son should *prima facie* be held to hold the property as joint family property; but, where the property is taken by gift or will from a stranger or from a collateral relation, there is no warrant for making the presumption that it is taken with the incidents of joint family property.

Janakiram Chetty v. *Nagamony Mudaliar,* (1925) I L R 49 M 98: 50 M L J 413 followed.

P. Venkataramana Rao for plaintiff.

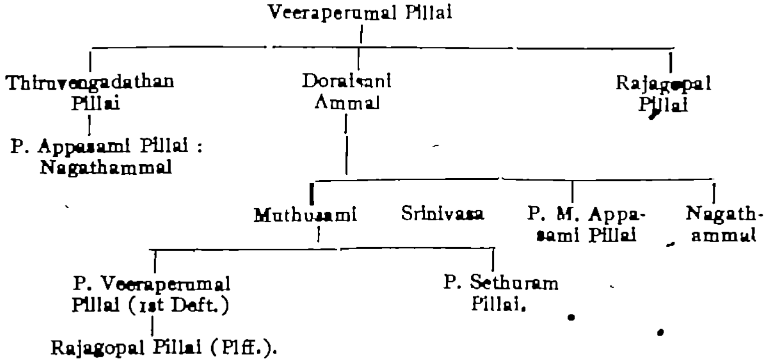
V. Radhakrishniah for 3rd defendant.

G. Rajagopalachari, K. S. Narayana Aiyangar with *King and Partridge* for 4th defendant.

S. T. Krishnamachari for 5th defendant.

The Court delivered the following

JUDGMENT :—In this suit a very large amount is involved but otherwise this is a typical case. In form the suit is for partition of family property but in truth it is an attempt by a son with the aid of his father to recover for his family the properties alienated by the latter. The following pedigree explains the relationship of the parties:—



Rajagopal Pillai v. Veeraperumal Pillai.

The plaintiff Rajagopal Pillai is a minor who sues by his next friend. The 1st defendant, his father, became an insolvent and his estate is now represented by the 5th defendant the Official Assignee of Madras. No relief is sought against the 2nd defendant who has not appeared to defend the suit and the really contesting defendants are the 3rd and the 4th. The 3rd defendant holds a mortgage for Rs. 2,50,000 and the 4th defendant for about Rs. 1,24,000. These two mortgages were executed by the 1st defendant and the primary object of the suit is to get rid of them.

On the 30th of March, 1915, there was a partition among the members of the plaintiff's family who at that time were (1) P.M. Appasami Pillai, (2) Veeraperumal Pillai (the 1st defendant), (3) Sethuram Pillai, and (4) the plaintiff, the son of Veeraperumal Pillai. By the partition Sethuram Pillai and Nagathammal, the sister of Appasami Pillai, were given certain properties; some were allotted to P. M. Appasami Pillai and some to the 1st defendant as representing himself and his son. Shortly after the partition, on the 11th of August 1915, Appasami Pillai made a will in effect bequeathing his properties to the 1st defendant. On the 19th of October 1920 he made a codicil which however did not substantially alter the will. Appasami Pillai died on the 4th of October 1921. As I have said the mortgage in favour of the 3rd defendant was executed on the 10th April 1923, and that in favour of the 4th defendant on the 31st of May 1924. It is the same set of properties that were comprised in both the mortgages. Four properties were mortgaged, one of them being a property that fell to the share of the 1st defendant at the partition and the other three being those that were allotted to Appasami but were bequeathed by him to the 1st defendant.

Mr. Venkataramana Rao for the plaintiff has advanced several contentions. The gist of them is that all the four properties mortgaged to the 3rd and 4th defendants were joint family properties in which the plaintiff has an interest. These defendants do not admit that the plaintiff has any right in the properties taken by the 1st defendant under the will of his uncle. Mr. Venkataramana Rao firstly urges that the partition of 1915 was intended only to separate Sethuram Pillai but that as between Appasami and the 1st defendant it was a sham and a pretence. Secondly, he urges that if there was a partition, there was an immediate re-union between the 1st

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defendant and his uncle. He thirdly contends that granting there was a real partition, the 1st defendant should be taken to have thrown into the hotch-pot the properties taken by him under the will and that all the properties thus became joint family properties in which the plaintiff has an interest. He fourthly urges that the devise in favour of the 1st defendant must be taken to be in his character as the manager of the joint family consisting of himself and his son and that in this view again the plaintiff has an equal right with his father.

I shall postpone the consideration of these interesting questions to a later part of my judgment; for, in my opinion, it is unnecessary to deal with any of them as the case may be disposed of on the assumption that the properties jointly belonged to the 1st defendant and the plaintiff. So far as the creditors the 3rd and the 4th defendants are concerned, their case rests on very firm foundation and from their point of view the questions that have been raised can be only of academic interest. They have taken up this position. "Let it be granted that the properties are joint family properties but we are able to conclusively prove that the amounts we advanced were utilised for paying off the antecedent debts of the 1st defendant the father. If this be so, the son is as much bound as the father by the mortgages in our favour." This case has been proved to the hilt. Every rupee advanced by these creditors was required for, and utilised in paying off, antecedent debts.

I shall first take the transaction with the 3rd defendant. He is receiver of a certain estate and obtained permission of the High Court to lend monies to the 1st defendant. The recitals in the deed are very categorical. The 1st defendant represented to this creditor that he had pressing debts to the extent of about 3 lakhs and 30,000. Though every point in this case has been contested, I must say that the evidence is so convincing that only one conclusion is possible. The deed provides that the lender was to retain Rs. 3,250 as his commission which was to be credited to the estate which he represented. The rest of the amount was advanced by three cheques. The 1st defendant has gone into the box and has admitted the receipt of the cheques.

Next I shall deal with the application of the money. The 1st defendant handed to the 3rd a memorandum showing how the sum of 2 lakhs and 50,000 was really expended. That is marked Ex. 6. It contains complete particulars and every one of the items in that memorandum has been proved,

Rajagopal Pillai v. Verapperumal Pillai.

I. Rs. 29,015-0-0 was paid to Sah Agarchand Manmal. There were four promissory notes in his favour outstanding. They are the following:—

(1) Promissory note dated 11th July, 1921 executed by Appasami and the 1st defendant for Rs. 10,000.

(2) do. dated the 13th September, 1921 by do. for Rs. 1,000.

(3) do. dated 13th May, 1922 by 1st defendant alone for Rs. 10,000.

(4) do. dated 2nd March, 1923, by do. for Rs. 7,500.

All the four amounts had been borrowed on the security of a property at Guindy known as "Winning Post". At the partition there was merely the site and the building had not been built. The site was treated as Appasami's separate property at the division. The amount due on these four notes was paid up from the money borrowed from the 3rd defendant and the notes which were returned to the 3rd defendant after being duly cancelled are now produced by him. The "Winning Post" which was thus redeemed is one of the properties included in the mortgages in question.

II. The next item shown in Ex. 6 is a payment of Rs. 5,000 to Aparanji Ammal. A legacy of Rs. 15,000 was given to this lady under the will of Appasami and the Rs. 5,000 referred to was paid towards this legacy from the sum borrowed. There can be no question that this payment is binding on the plaintiff.

III. The next payment referred to in Ex. 6 is of Rs. 38,773-14-6 to Messrs. Gillanders Arbuthnot & Co. The 1st defendant traded under the name of Burrang and Company with this Firm in timber and became largely indebted to it. The firm filed several suits against the 1st defendant and one of them was C. S. No. 393 of 1922 on the file of this Court. In that suit it obtained a decree against the 1st defendant for Rs. 37,435-14-9. On 17th March 1923 execution was ordered to be taken out against the 1st defendant. It has been proved that from and out of the amount advanced by the 3rd defendant the 1st defendant paid the decree amount and satisfied the decree.

IV. The next payment referred to in Ex. 6 is that of Rs. 10,000 to Sethuram Pillai. This sum came to be paid in

the following circumstances. After the death of Appasami, Veeraperumal applied to this Court for probate of his will. Sethuram Pillai filed a Caveat but his objection was disallowed and probate was ordered to be issued by the trial Judge: Sethuram Pillai filed an appeal. While the appeal was pending, Sethuram and the 1st defendant entered into an agreement, which was to the effect that on the 1st defendant paying Rs. 50,000 to Sethuram he was to withdraw his appeal. The payment of Rs. 10,000 was made towards this sum of Rs.50,000. Sethuram is shown as a creditor for the balance of Rs. 40,000 in the schedule of debts filed by the 1st defendant in the insolvency proceedings. This payment of course is clearly binding on the plaintiff.

V. The next payment shown in Ex. 6 is that of Rs. 80,000 to Kanniah Lal Mohan Lal. A sum of Rs. 1,05,000 was due to Mohan Lal Kanniah Lal on a mortgage dated 2nd March, 1922 executed by the 1st defendant for himself and as guardian of the present plaintiff. Out of the amount advanced by the 3rd defendant, the 1st defendant paid Rs. 85,000 to Mohan Lal Kanniah Lal and got one of the mortgaged properties, 74, Varada Muthaiappan Street, released from the mortgage. I may mention that after giving credit for this sum of Rs. 75,000, Mohan Lal Kanniah Lal filed C. S. No. 399 of 1925 on the file of this Court against the 1st defendant and the plaintiff. The present plaintiff, defendant in that action, pleaded that the debt was not binding upon him as it was illegal and immoral. That plea was found against by a learned Judge of this Court and a decree was passed on the 6th of August, 1926.

VI. The next payment shown in Ex. 6 is of Rs. 41,600 to Madan Mohanjee Temple. This amount was due on a mortgage executed by Appasami Pillai himself over 1|72, Varada Muthaiappan Street, a property that fell to his share at the partition. The amount was repaid by the 1st defendant from and out of the money advanced by the 3rd defendant and the plaintiff is clearly bound by this payment.

VII. The next payment shown in Ex. 6 is that to the Tata Bank amounting to Rs. 22,000 and odd. This debt arose in the following way. The 1st defendant borrowed money from one Chokkalingam to pay off a debt due to Gillanders Arbuthnot & Co. For the sum borrowed, namely Rs. 25,000, the 1st defendant executed a promissory note in favour of Chokkalingam who in his turn endorsed it to the Tata Bank. When the

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latter called on Chokkalingam to pay he made default. Demand was then made on the 1st defendant who as the maker of the promissory note was liable and he had to pay up the debt. This sum of Rs. 22,000 was paid to the Tata Bank from the money raised from the 3rd defendant. This payment is again binding on the plaintiff.

VIII. The next payment shown in Ex. 6 is to Murali Doss of Rs. 2,000. This has also been proved to be an antecedent debt and the plaintiff cannot question it.

. These exhaust the payments made to creditors. The rest of the amount is made up of stamp and registration charges (Rs. 2,661), commission paid to the broker who negotiated the mortgage (Rs. 8,000) and the discount allowed to the lender (Rs. 3,250). The facts I have set forth show that not only was the representation on which the 3rd defendant acted was true, but that as a matter of fact the monies lent by him went in discharge of antecedent debts.

I shall now turn to the case of Gillanders Arbuthnot and Company, the 4th defendant. The 1st defendant had, as I have said, dealings with them in timber. In dealing with the 3rd defendant's case I have already referred to a decree obtained by this firm against the 1st defendant. They obtained two other decrees. On the 26th October 1922, they obtained a decree on a promissory note dated 10th November, 1921, for about Rs.1,10,000. Another decree was obtained on 20th September 1923, in C. S. No. 498 of 1923 for about Rs. 55,000. Application was taken out against the 1st defendant for execution and for the balance of the decree amount then due to this firm the suit mortgage in their favour was executed the 1st defendant acting for himself and as the guardian of his minor son. Thus we find that the consideration for the mortgage represents wholly an antecedent debt and the plaintiff is thus liable.

The facts which I have reviewed at some length establish (1) that the money paid by the 3rd defendant for his mortgage really went in discharge of antecedent debts, and (2) that the consideration for the 4th defendant's mortgage represents an antecedent debt due to himself. Mr. Venkataramana Rao contends that a major portion of these antecedent debts is of the nature known as "avyavaharika" and that the plaintiff is not therefore liable. The 1st defendant carried on a business in timber under the name of Burrang and Co., and incurred several debts. The money advanced by the 3rd defendant

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was to some extent utilised in paying off these debts. The whole of the debt due to the 4th defendant was incurred in the course of that trade. The contention is, that the 1st defendant's family was not a trading family and that if debts are incurred in a trade which is commenced by the father, the son is not liable for them under the pious obligation recognised by the Hindu Law. For this position he relies upon the text of *Gautama* which is to the following effect:

"Money due by a surety, a *commercial debt,* a fee due to the parents of the bride, debts contracted for spirituous liquor or in gambling and a fine shall not involve the sons of the debtor."

It is significant that of the several texts that bear on this question, the only text which gives the son exemption from payment of commercial debts is the text of *Gautama.* In my judgment in *Muthammal* v. *Sivagami Ammal* (1) I set forth all the texts that deal with this point. The word "avyavaharika' occurs in the text variously attributed to *Vyasa* and *Usanas.* That text is to the following effect:

"The son has not to pay a fine or the balance of a fine or a tax (or toll) or its balance (due by the father) nor (avyavaharika or not vyavaharika) that which is not proper."

The word "avyavaharika" has generally been rendered as illegal and immoral. Judges have from time to time attempted to define this word and there has been some divergence of opinion and after reviewing several cases, I thus stated my view in the case to which I have made reference:

"It is not every impropriety or every lapse from right conduct that stamps the debt as immoral. The son can claim immunity only when the father's conduct is utterly repugnant to good morals or is grossly unjust or flagrantly dishonest."

Judged by this text a trade debt is certainly not an "avyavaharika" debt.

There is a large body of case-law on the point, but there is not a single reported decision where a commercial debt has been treated as an illegal or an immoral debt. In *Achutharamaiya* v. *Ratnajee* (2) the question was for the first time raised. The Chief Justice and Viswanatha Sastri, J., regarded the text of *Gautama* as obsolete and refused to treat trade debts as *avyavaharika* debts. It is impossible to believe that even in remote antiquity commercial debts were regarded as immoral debts.

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1. (1925) 21 L W 606.
2. (1925) I L R 49 M 211: 50 M L J 208.

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Trade is enjoined as a duty in the case of one of the three higher castes and it is incompatible with that notion to regard commerce as degrading. The very fact that out of so many texts, the solitary text of *Gautama* alone can be cited in support of this theory shows that the rule enunciated by him did not correctly reflect the prevalent opinion even of his day. It is unnecessary to speculate further regarding this; for the law on this subject is after all judge-made law and no modern Court would tolerate the proposition that to engage in trade is a sin and that a debt incurred in trade is an immoral debt.

In the present case it is unnecessary to base my judgment on any such general ground. The question may arise in two ways: the creditor may seek to make the debt binding upon the son, because the father incurred it for family necessity or benefit. If the debt in such a case is a trade debt the son may plead that the family not being a trading family the debt is not binding upon him. Though, in my opinion, such a plea is unsustainable, the question does not pointedly arise at present. The case under consideration is not a case of this description. It belongs to the second category, that is, the creditor may seek to show not that the debt was incurred for a family purpose but that the amount advanced went in discharge of an antecedent trade debt. The son's obligation comes into being owing to an entirely different rule. The test is not that the debt was incurred for a family purpose but for discharging an antecedent liability. The only question then is, is the antecedent debt of an illegal or immoral nature? The fact that it arose out of trade cannot bring it within the description of immoral and illegal debts. I therefore find on this point against the plaintiff. Before concluding this part of my judgment I must point out that the cases that lay down that the manager of a Hindu family cannot start a new trade, are for the present purpose beside the point. We are here concerned not with a manager but with a father and, moreover, as I have pointed out, we are not concerned with the father raising money for the benefit of the family but with his paying off an antecedent debt

I have up till now dealt with the case, making the assumption on behalf of the plaintiff that in spite of the partition, Appasami and Veeraperumal held their properties as joint family properties. So far as the creditors are concerned, in the view I have taken, they are not interested in the other questions that have been raised. But I shall now examine the soundness of the position taken up by the plaintiff, that in spite

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of the partition his father and Appasami continued to remain joint.

In an earlier part of this judgment I have indicated the main lines of Mr. Venkataramana Rao's argument on this head. The oral evidence that has been adduced for the plaintiff is most unsatisfactory. It is contended that the evidence establishes that the income from the two sets of properties—those that fell to the share of Veeraperumal and those to the share of Appasami—was blended and that therefore it must be presumed that all the properties were alike treated as joint family properties. Beyond the fact that one clerk was employed to collect rents from both the sets nothing further has definitely been proved. It is noteworthy that this very clerk was subsequent to the partition also employed to collect rents from Sethuram's properties. Next it is argued that these rents were brought into a common account book. The plaintiff attempted to file some books and I had to reject them and the ruling that I gave at the time is appended to this judgment. It is admitted that there were dealings *inter se* between Appasami and Veeraperumal; and that each paid interest to and accounted for the monies received from the other. The fact that in the first instance amounts were brought into the same account could be of no value if the ledgers that are withheld would show that the collections were carried into the separate accounts of these two individuals.

Then it is contended that subsequent to the partition Appasami and Veeraperumal continued to live in the same house and had a common mess. This part of the case also broke down. The partition took place in 1905. Appasami died in 1921. About 1918 he left the family house and took up residence at the "Winning Post" in Guindy. It is undisputed that Veeraperumal did not live with Appasami in Guindy. The only possible dispute narrows itself to the period between 1915 and 1918. The next friend of the plaintiff said that Appasami and Veeraperumal cooked and ate separately. But the other witnesses examined for the plaintiff did not admit this fact. In any event it is impossible to infer that the uncle and nephew continued as members of a joint family from the single circumstance that for a short time they lived and ate together. In this connection it is important to bear in mind that the partition deed itself provides that Appasami and Veeraperumal should live together in the old family house. It would be

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unreasonable to presume that in living in the same house they did not intend to carry out the terms of the partition deed itself. Further Appasami had neither wife nor children and if he was willing to bear the common household expenses it would only show that he treated his nephew with affection and not that there was an intention to re-unite.

The presumption in law is against re-union. Mayne observes in para. 497 of his Hindu Law:

"As the presumption is in favour of union until a partition is made out, so after a partition the presumption would be against re-union. To establish it, it is necessary to show not only that the parties already divided, lived or traded together, but that they did so with the intention of thereby altering their *status*, and to form a joint estate with all its usual incidents."

The evidence is clearly insufficient to show either that the partition was a mere sham or that there was a subsequent re-union. Indeed the facts that have been elicited conclusively negative any such case. Subsequent to the partition Veeraperumal started, as I have said, a business in timber under the name of Burrang and Co. The dealings were on a large scale and monies were borrowed from third parties. Appasami had no concern in this trade, did not make himself liable for the debts and did not participate in its profits. Then again Appasami dealt with the properties that fell to his share as if he was the sole owner. He sold "Rutland Gate" in 1920 for a very big price, 4 lakhs. In the sale deed he refers to the partition deed and describes himself as the absolute owner. The purchaser paid Rs. 50,000 in cash and gave a mortgage over the same property for the balance of the price. This was payable in instalments and as the purchaser made default Appasami filed C. S. No. 231 of 1921 for the recovery of the amount. He filed the suit in his own right and not as a member of a joint family. Appasami died on the 4th October 1921 and Veeraperumal brought himself on the record of that suit as Appasami's legal representative, which fact is inconsistent with his treating himself as being joint with his uncle. Throughout in dealing with such a large property as "Rutland Gate", Appasami acted upon the footing that the partition was a real and genuine transaction without either objection or protest on the part of his nephew. I must observe that in regard to this property it was a sub-mortgage that was created in favour of the 3rd and 4th defendants. The property had ceased to belong to Appasami in his lifetime and what he held was merely

a mortgage. In any event it cannot be disputed that in taking the mortgage Appasami acted for himself and not for his family.

1|72, Varada Muthaiappan Street, is another property included in the suit mortgages. It fell to Appasami's share and subsequent to the partition he mortgaged it to Madan Mohan Temple. Veeraperumal did not join in the mortgage. The amount that was borrowed, about 25 or 30 thousand, was utilised by the uncle and not the nephew. There is nothing to indicate that this was thrown into the common stock.

The third and the last property coming in this category included in the suit mortgages is the "Winning Post". Appasami held the site on which this was built as his separate property even previous to the partition. After the building was constructed it yielded no rent. There has not been even an attempt to point to any act on Appasami's part to show that he threw it into the common stock and converted it into joint family property.

The plaintiff has completely failed to show that either the partition was not intended to be given effect to or that there was a subsequent re-union.

The next contention of the plaintiff is that although the bequest is in terms to Veeraperumal only, it should be held to enure to the benefit also of his undivided son the plaintiff. I cannot see my way to accept this contention. There has been a great diversity of opinion on the question whether when a bequest is made by a father to his son such property is held by the latter as his separate or ancestral property. Then again there has been a conflict of opinion as to whether a property bequeathed by a father to his sons is taken by them as joint tenants or tenants in common. The Judicial Committee in *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (3) review the decisions of the various High Courts and point out that there has been divergence of opinion; but they do not state their own view and leave the question open.

In *Nagalingam* v. *Ramachandra* (4) it was laid down that if there were no words indicating a contrary intention, the inference should be that the father intended his sons to take his property as their ancestral estate. The exact opposite of this was held in *Yethirajulu Naidu* v. *Mukunthu Naidu* (5) where

3. (1923) I L R 45 A 596 (P C).
4. (1901) I L R 24 M 429: 11 M L J 210.
5. (1905) I L R 28 M 363: 15 M L J 299.

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the learned Judges observed that in the absence of expressed intention the sons take in severally and not as joint tenants. I may point out that in Madras the weight of authority is in favour of the view taken in *Nagalingam* v. *Ramachandra* (4) but it is necessary to remember that the question arises in this case in a different form. It is not a bequest by a father to his sons. It is, on the contrary, a bequest by an uncle to his nephew.

In the case of a father's separate property when the sons take it by inheritance they take it as ancestral property, that is to say, their male issues acquire in it a right by birth. The law presumes that a Hindu who gifts or bequeaths his property does not intend to alter the incidents of the property devised or gifted. If in the case of inheritance the property is taken as ancestral property, why should it be presumed that it is taken as separate property merely because there is either a will or a gift? It is on this principle that the Courts have laid down that when the bequest or the gift is in favour of the sons they should *prima facie* be held to hold the property as joint family property.

I am not now concerned with the correctness of this rule, but I see no reason which would justify me in extending it. When the property is taken by gift or will from a stranger or from a collateral relation, there is no warrant for making the presumption that it is taken with the incidents of joint family property. On this point I agree with the decision of Kumaraswami Sastri, J., in *Janakiram* v. *Nagamony* (6). Take the case of a collateral relation. If his property was taken by the father by inheritance, the son would have no right in it by birth. Why should he have a higher right merely because the father takes it not by inheritance but under a gift deed or a will? This is the distinction pointed out by Kumaraswami Sastri, J., and I am disposed to take the same view. In the present case, if Appasami Pillai had died intestate the property would have been taken by Veeraperumal as well as Sethuram to the exclusion of the plaintiff. The very fact that by the will he alters the course of descent shows that it was not his intention that the property should be taken as joint family property. Turning to the will itself (for, in each case, it is, where possible, a question of construction of the instrument)

4. (1901) I L R 24 M 429: 11 M L J 210.
6. (1925) I L R 49 M 98 : 50 M L J 413.

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its recitals show that he intended that his nephew should take it as his absolute property. There is no reference to the plaintiff and if the testator intended that he should have an interest, there was nothing to prevent him from clearly expressing that intention. I therefore find this point also against the plaintiff.

On these findings it follows that the plaintiff can have a decree for partition only in respect of items in Part I of Schedule B to the plaint, and I accordingly pass a preliminary decree to that effect. This right of the plaintiff is of course subject to the mortgage of No. 74, Varada Muthaiappan Street, item 3 of Part I in favour of the 3rd and 4th defendants. The Official Assignee does not object to this decree being passed. In other respects, the suit is dismissed.

For passing a final decree the case is adjourned till the administration of the estate by the Official Assignee is completed.

The plaintiff has really failed in the action. The minor relief he has obtained is really not the one for which he has filed the suit. I must direct him to pay the costs of the 3rd and 4th defendants (two sets). I do not think the Official Assignee is entitled to any costs.

The 3rd defendant is a receiver appointed by Court representing an estate and he is allowed to charge his estate with actual out-of-pocket expenses including the fee paid to his vakils as between party and vakil. The fee for this purpose is fixed at Rs. 2,400 for the senior vakil and Rs. 800 for the junior. The fee for translating the partition deed, Rs. 32, shall be paid by the 3rd defendant and he may include the same in the costs to be recovered against the plaintiff.

N. S. *Suit partly decreed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT :—LORD PHILLIMORE, LORD DARLING, MR. AMEER ALI AND SIR LANCELOT SANDERSON.

Sathappa Chetti and others ... *Appellants**

v.

S. N. Subramanian Chetty and others ... *Respondents.*

P. C.

Sathappa Chetti v. Subramanian Chetty.

Partnership—Dissolution and accounts—Suit for—Parties—Superior partnership between suit firm and third party—Third party not member of suit firm if necessary party—Partnership at will—Dissolution—Suit by partner claiming dissolution—Effect—Limitation Act (1908), *Art.* 106—

*P. C. Appeal No. 46 of 1924, 14th February, 1927.

P. C.

Sathappa Chetti v. Subramanian Chetty.

Partnership—Dissolution and accounts—Suit for—Limitation—Partnership—Dissolution—Realisation of assets—Condition of, under partnership arrangement—Business stopped by partnership in such a case—No dissolution by reason of.

In a suit for a dissolution of partnership and accounts and consequential relief, *held*, that a person who was not in partnership as a member of the suit firm, but possibly in a superior partnership of which he was one side and the whole of the suit firm as a unit was the other side was not a necessary party.

In the case of a partnership at will, a suit by a partner claiming dissolution intimates his will to dissolve, which of itself is enough to put an end to the partnership.

In a suit for dissolution of a partnership and accounts and consequential relief, it appeared that in a prior litigation between the parties, which terminated only within three years of the suit, the defendants contended successfully that the partnership was still subsisting. *Held* that, under the circumstances, the partnership could not be held to have been dissolved more than three years before suit, and that the suit was therefore within time.

Where, under the terms of a partnership, a final dissolution of the partnership cannot take place until certain assets are realised, the partnership must be held to go on until those assets are realised, even though it does not do any business.

Appeal No. 46 of 1924 against a decree, dated the 7th October, 1921, of the High Court at Madras which reversed the decree, dated the 31st March, 1919, of the Subordinate Judge of Sivaganga.

[For a full report of the High Court's judgment *see* 43 M L J 758.]

Dunne, K. C. and *Kenworthy Brown* for appellants.

Sir G. Lowndes, K.C. and *Narasimham* for 1st respondent.

14th February, 1927. The Judgment of their Lordships was delivered by

Lord Phillimore.

LORD PHILLIMORE.—The contention of the appellants has been ably put before their Lordships; but in their view it fails.

In this case five Chetti families formed, in April, 1902, an oral partnership at will for the purpose of conducting a banking and money-lending business in Burma, they being themselves resident on the continent of India. The plaintiff and his children formed one of the families and it will be convenient to treat the representative head as the single party in the judgment which their Lordships are giving. He held six and a half out of ten shares. Only 30,000 rupees were paid in as capital, but it was one of the terms of the arrangement that the plaintiff

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should be called upon and be prepared to lend further sums at a specified rate of interest. Business was carried on by agencies and the first agent was one of the partners, the third defendant. He did not manage well and by 1907 there had been very great losses. After that time very little money-lending business was done; it gradually diminished and finally ceased, other agents being appointed, whose principal occupation was to get in the debts. The plaintiff advanced very considerable sums of money and it is obvious and had been obvious for a considerable time that, if and when the partnership came to an end, or whenever it should come to an end, the only question would be how much the defendants would have to pay to the plaintiff. It is quite clear that there will be a considerable loss. It is quite clear that the plaintiff will not get back a great portion of his advances. He will himself have to contribute six and a half shares out of the ten shares of the loss, but he will be entitled to something more or less, unless he is barred by the Limitation Act, from the other defendants.

On 3rd January, 1910, the present plaintiff and the first defendant sued the third defendant, making the other partners also parties, to recover the loss which his mismanagement was supposed to have produced. He set up that it was a partnership matter and that nothing could be determined against him until the accounts of the partnership were taken, and the Subordinate Judge agreed with him on 5th December, 1911, and dismissed the suit. The High Court affirmed this and dismissed the appeal on 21st January, 1915.

On 6th March, 1917, the plaintiff instituted the present suit against his four other partners and their sons, claiming a dissolution of partnership and accounts and consequential relief, including a Receiver to get in such assets, if any, as are still outstanding.

The defence raised two points, one of which can be disposed of at once, that there was a partner called Neelamegam, who was a necessary party to the suit. The Subordinate Judge thought he was; the High Court thought he was not; that he was not in partnership as a member of the firm, but possibly in a superior partnership of which he was one side and the whole firm as a unit was the other side. In their Lordships' view that is right and that settles the question; he is no necessary party to an internal suit between the five members of the unit which formed the partnership with him.

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That leaves the question of the Limitation Act. In the view of the Subordinate Judge this partnership had been dissolved considerably more than three years before the date of the institution of the present suit. In their Lordships' view this was not so; in their view there never had been any dissolution until the plaintiff, by the present suit, by his writ and plaint claiming dissolution, intimated his will to dissolve, which of itself is enough to put an end to a partnership at will. Their Lordships think that the Judges of the High Court were right. It is clear that up to some stage in the previous suit the parties were urging and successfully urging that the partnership was still subsisting. On one view that may be said to be the case up to the date of the appeal judgment in 1915, which, if so, is within the period of limitation; but, even if that view be not taken, there is no definite date upon which the defendants can put their fingers successfully as a date at which the partnership was dissolved, and, when their Lordships come to consider the business which lies at the root of the whole matter, it stands in this way. The plaintiff ought at some time or other to recover some moneys from the other parties. If the partnership was put an end to some years ago his rights arose then and either the parties ought at once to have contributed such a sum as would make up to him his share of the loss or they ought to have in some way disposed of the remaining assets and then met the remainder of the loss by their contributions. But no one at the time suggested this. On the other hand, they were entitled to say to the plaintiff: "Until all the assets are realised we cannot tell how much we owe to you and we claim not to pay you anything until all the assets are realised." If so, for that purpose the partnership went on; it went on, not because it would do any more business, but because, until those assets were realised, the final dissolution of the partnership could not take place. For this and for the other reasons given by the learned Judges in the High Court their Lordships are of opinion that their decision was right, and they will humbly advise His Majesty that this appeal be dismissed with costs. The judgment of the High Court, remitting the case with directions to the Subordinate Judge, in the circumstances appears to their Lordships to be the right one.

Solicitor for appellant : *H. S. L. Polak.*

Solicitors for respondents: *Douglas Grant and Dold.*

Appeal dismissed.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice*, MR. JUSTICE BEASLEY AND MR. JUSTICE SRINIVASA AIYANGAR.

The Commissioner of Income-tax, Madras ... *Referring Officer**

v.

T. S. Firm, Tanjore at Negapatam ... *Assessee.*

F. B.
—
Commissioner of Income-Tax
v.
T. S. Firm, Tanjore at Negapatam.

Indian Income-tax Act, S 4 (2)—Resident in British India—Company or partnership having several places of business within and outside British India—When can be said to have several residences.

If it can be shown that the central management and control of a company or partnership, by which words are meant the management and control of the whole of the business, was divided between two localities, each of them may be said to be a residence of the company or partnership for the purposes of the Income-tax Act. The suggested second residence must not merely have delegation of the management of some portion of the partnership business however extensive, but a delegation of some portion of the management of the business as a whole.

A firm had several places of business. In Ramachandrapuram which is situated in Pudukotta State outside British India, the partners regularly resided and exercised a general supervising and directing power over the whole of the business. The firm had many branches in British India which were generally controlled from Madras. It had also branches outside British India in the Malay States and elsewhere. There was no proof that any part of the control of the overseas branches even passed through the Madras or any other branch in British India. The question arose, as regards the profits earned in the overseas branches, whether the firm can be said to be resident in British India.

Held, that the firm cannot be said to be resident in British India within S. 4 (2) of the Income-tax Act.

The Swedish Central Railway Co, Ltd. v. *Thompson*, (1925) A C 495 referred to.

Case stated under S. 4 (2) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras. in his letter No. 1516 of 1925, dated 20th November, 1925.

The Case stated by the Commissioner of Income-tax, Madras, was as follows:—

I have the honour to refer the following question of law for the decision of the Hon'ble Judges of the High Court:—

"In the circumstances of this case, can the assessees, the T. S. Firm, be said to be resident in British India?"

2. The assessees are a well-known Nattukottai Chetty firm of Bankers, money-lenders and cloth merchants. The firm has been registered under S. 2 (14) of the Indian Income-tax Act,

*Referred Case No. 23 of 1925. 7th February, 1927.

F. B.

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in accordance with a partnership deed drawn up and registered at Madras on 18th December 1922. The partners are: Chokkalingam Chetty, Subbiah Chetty, Krishnan Chetty, Raman Chetty and Muthiah Chetty, the descendants of the original founders of the firm. The business is carried on through agents at Madras, Rangoon, Negapatam, Pegu, Pyapon and Henzada in British India and also at various places in the Straits Settlements. Under S. 64 of the Income-tax Act, Negapatam has been declared to be the principal place of business In the assessment year under consideration, 1924-25, a sum of Rs. 1,00,671 was remitted from Singapore and Penang in the Madras Office and was then transferred to an account called the 'Cuddalore account' kept at Madras in which the drawings of the partners are adjusted. I find as a fact and no reference has been claimed on this part of the case, that the sum of Rs. 1,00,671 came out of profits of the Singapore and Penang branches of previous years. It was not the profit of the year of account, *i.e.*, of the previous year, and therefore it cannot be taxed under S. 4 (1) but can only be taxed under S. 4 (2), *i.e.*, as profits of the previous three years arising or accruing outside British India to a person resident in British India and brought into British India in the year of account. The question on which the decision of the Hon'ble Judges of the High Court is sought is whether in the circumstances of this case it can be held that the assessees, *i.e.*, the registered firm known as the T. S. Firm, be considered to be a person resident in British India.

3. On this question I find the facts to be as follows:—

The registered firm was created for the purposes of income-tax at Madras on 18th December, 1922 by a partnership deed drawn up and registered there. The deed recites that the members of the family will carry on money-lending business in six places in British India and also abroad. The account in which personal drawings of the partners are adjusted is kept at Madras and is called the 'Cuddalore account'. The partners of the firm undoubtedly do reside for the greater part of the year at Ramachandrapuram, Pudukotta State, *i.e.*, outside British India. There they have palatial residences and from there they keep in touch with the actions of the agents and do exercise a very real control over the business. No business is carried on by the firm in Pudukotta State, the bulk of the Madras Presidency business being done at Madras itself. The agents at the various places of business work under powers of attorney which give them complete power to bind the principals and full discretion in the conduct of the business. Although the partners reside for most of the year at Ramachandrapuram and have telegraphic addresses there they visit Madras Presidency frequently throughout the year to give oral instructions to the agents to interview the Banks and generally to supervise the business. They also attend certain annual festivals at certain temples. I am unable to say definitely how often the partners visit Madras in the course of the year

but I emphatically deny the accuracy of the allegations made in the affidavits filed before me during the hearing of the application. The partners have been in Madras much more often than is stated in these affidavits. The Ramachandrapuram press copy books which I have seen contain references to visits to Madras. Moreover, while there are numerous letters to the agents at other places there are very few to Madras and none to Negapatam which indicates that the partners were visiting these places in person. I also find in their copy books references to letters written from Tiruppapuliyur, which show that the partners direct the business to some extent from British India. The partner who really controls the business, Raman Chetty, was in Madras for about 10 days, during the appeal proceedings in connection with the crisis which occurred in the Chetty world about June, 1925. He was also in Madras for a considerable period in the year 1924-25 about the time of the hearing of what is known as the 'Bank Case'. I also find that the partners have residences within the Madras Presidency at Madras and at Cuddalore. At Cuddalore they have a house adjoining or situated very close to a *chatram* which they have built there. In this house the members of the family stay when they visit Cuddalore for certain festivals. At Madras the firm owns a house at 132 and 133, Coral Merchant Street, in which business is carried on. In that house the partners stay whenever they visit Madras. It was contended before me during the hearing that this building could not be classed as a residence because it is in the business part of the town and because the upstairs was formerly a godown and that if the partners stayed where they could only be said to be camping in discomfort which could not constitute residence. These allegations are incorrect. The Madras building is in a street in which many Chetties and others live. It is built in the usual residential style and the local agent and clerks do live there permanently. It has a kitchen and bed-rooms and bath-rooms upstairs and is an ordinary and perfectly comfortable residence according to certain standard. At the time I visited it a son of one of the partners was actually living there having come to Madras to see about the opening of the new accounts. To summarise my finding of facts the T. S. Firm was registered in the Madras Presidency. It carries on business there; the business is ultimately controlled from Ramachandrapuram in an Indian State; the partners have a permanent place of residence in British India to which they can go at any time in which they do go quite frequently.

4. On these facts an assessment was made on the firm's foreign profits on the ground that they had been brought into British India by a person resident in British India. The Assistant Commissioner who confirmed the assessment on appeal based his decision on the grounds that the residence of a firm must be held to be the place of the residence of the partners, that the partners could have more than one place of residence and that

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though they had a residence in Pudukotta State they also had a residence in Madras within the meaning of the definition of residence in S. 3 (23) of the Madras City Municipal Act. I am not sure that these are the only grounds on which it can be held that the firm is resident in British India. As far as I know no legal test of residence of a firm has yet been laid down by Indian Courts and while I believe that the Assistant Commissioner's reasoning was sound, I consider that the firm could also be held to be resident in British India because the actual operations which earn the profit are carried on there or in the language of the English cases because the firm "keeps house and does business" in British India. I do not deny that Ramachandrapuram—the place from which the operations of the firm are chiefly directed—may be held to be the residence of the firm, but I believe that a firm like an individual or corporation can have more than one place of residence and that the place at which the firm was created for income-tax purposes by registration and at which the firm earns its profits can also be held to be the place of residence of the firm. My view seems to be supported by the decision of the House of Lords in the case of *The Swedish Central Railway Company, Limited* v. *Thompson* (1) and by the cases cited in the judgment in that case.

5. I am therefore of opinion that the T. S. Firm is a person resident in British India on these two grounds:

(*a*) that the partners reside here; and

(*b*) that its profit-making operations are carried on here.

M. Patanjali Sastri, Special Counsel for Referring Officer.

A. Krishnaswami Aiyar and *M Subbaroya Aiyar* for Assessee.

The judgment of the Court was delivered by

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J. :—The question propounded for our decision is as follows:—

"In the circumstances of this case, can the assessee, the T. S.Firm, be said to be resident in British India?"

The Income-tax Acts take residence as the test which is no doubt easy enough to apply in the case of an individual but leads to difficulties when you are dealing either with a limited company or a partnership because, as Lord Loreburn pointed out in *De Beers Consolidated Mines Co., Ltd.* v *Howe* (2) it is artificial to talk of the residence of a company which is necessarily a metaphorical expression as:

"a company cannot eat or sleep though it can keep house and do business."

He goes on to cite some earlier decisions and concludes thus (earlier decisions which he holds as laying down the rule

1. (1925) A C 495. 2. (1906) A C 455.

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that a company resides for the purpose of income-tax where its real business is carried on) and he adds:

"I regard that as the true rule, and the real business is carried on where the central management and control actually abides."

The question was carried further in the case of *The Swedish Central Railway Company, Ltd.* v. *Thompson* (1). There the contention was that a company could have more than one residence because the central management and control might be divided between two places of business, so that a company could be said to have two residences. I cite a passage from the judgment of Viscount Cave, the last paragraph of page 501:

"The effect of this decision is that, when the central management and control of a company abides in a particular place, the company is held for purposes of income-tax to have a residence in that place; but it does not follow that it cannot have a residence elsewhere. An individual may clearly have more than one residence: see *Cooper* v *Cadwalader* (3); and on principle there appears to be no reason why a company should not be in the same position. The central management and control of a company may be divided, and it may 'keep house and do business' in more than one place; and if so, it may have more than one residence."

If therefore it can be shown that the central management and control of a company or partnership, by which words I understand the management and control of the whole of its business, was divided between two localities, each of them may be said to be a residence of the company for the purposes of the Income-tax Act. But I read the learned Lord Chancellor as emphasising the words "central management and control" by which I understand that the suggested second residence must not merely have a delegation of management of some portion of the partnership business, however extensive, but delegation of some portion of the management of the business as a whole. With these considerations to guide me I approach the Commissioner's findings of fact in this case. Unfortunately he had directed himself to the view that what he was largely concerned with was the question of where the individual partners actually had physical places of residence and part of his reasoning, at any rate, the finding that the concern was assessable at Madras, was because the partners from time to time came over to Madras to look into the affairs of the Madras branch or perhaps of all the branches in British India and resided in a house in Madras belonging to the firm in Coral Merchant Street for varying periods. That, in my opinion, is a wholly irrelevant considera-

1. (1925) A C 495. 3. (1904) 5 Tax Cases 101.

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tion. The firm for the present purposes may be considered to have had three classes of activities. In Ramachandrapuram the partners regularly resided in what the Commissioner calls palatial residences and there exercised a general supervising and directing power over the whole of the business. Secondly, it had many branches in British India, which, I think he means to suggest, were generally controlled from Madras. Finally there were branches entirely outside British India in the Malay States and elsewhere and it is with the profits earned in these branches that we are concerned in this case. Had it been found as a fact that the control of the whole business, that is to say, the business including the branches outside British India was exercised both from Ramachandrapuram and Madras, it may very well be that the principle of the Swedish Central Railway Company's case would apply and that the central management of the business as a whole might be considered to be split up between Ramachandrapuram and Madras. I cannot see anything in the findings to give the slightest colour to any suggestion of the kind or to hint that any part of the control of the overseas branches even passed through the Madras or any other branch in British India. In these circumstances I am of opinion that the question propounded to us must be answered in the negative.

It was suggested in the course of the argument that the case might be sent back for fresh findings of fact in view of the observations of this Court and the test laid down by us. I cannot accept such a course because I think that the findings of fact must be taken to be complete and, though no doubt the Commissioner's mind was not applied to the exact point to which we think it ought to have been applied, I cannot doubt that if any evidence had been available as to any kind of management or supervision being exercised from British India over the overseas branches, the Commissioner would have stated it as supporting his case and set it out.

The Commissioner will pay the assessee's costs of this reference. Fees Rs. 250.

My learned brothers have seen this judgment and concur in it.

N. S. *Reference answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE CURGENVEN.

Mundlapati Jagannadha Rao and others ... *Appellants** (*Respondents 1, 3, 4, 5 and 7*)

v.

Rachapudi Basavayya ... *Respondent* (*Petitioner*).

Jagannadha Rao v. Basavayya

Execution—Mortgage decree—Sale of some of the properties in execution—Purchase by decree-holder—Satisfaction of decree entered up—Sale confirmed—Obstruction to delivery of some of the items of properties by stranger—Petition for removal of obstruction dismissed—Application to set aside satisfaction order and bring other items to sale—Maintainability—Civil Procedure Code, O 21, *R.* 91—*Limitation Act, Art.* 166.

The decree-holder who had obtained a mortgage decree brought to sale some only of the mortgaged items in execution of his decree and purchased them in Court auction. As the price fetched was enough to satisfy the decree satisfaction was entered. After the sale was confirmed, when he went to take possession of the property purchased, he was obstructed by a stranger and his petition to remove obstruction was dismissed. Thereupon he filed a petition to set aside the satisfaction that had been entered up and to bring to sale other items included in the decree.

Held, that the remedy of the decree-holder to have the sale set aside under O. 21, R. 91, Civil Procedure Code, within the period of limitation provided by Art. 166 of the Limitation Act, and, the same not having been done, the present application was not maintainable.

Held also, that the fact that the decree-holder was unable to obtain possession of the properties purchased by him in Court auction did not entitle him, without having the Court sale set aside, to execute the decree anew.

Muthukumarasamia Pillai v *Muthusami Thevan*, (1926) 52 M L J 148 followed.

A sale in execution of a decree of properties not belonging to the judgment-debtor is voidable and not void.

Appeal against the order of the Court of the Subordinate Judge of Bezwada, dated 16th April, 1925, and passed in E. P. No. 69 of 1924 in O. S. No. 33 of 1912.

Y. Suryanarayana for *N. Rama Rao* for appellant.

P. Satyanarayana for respondent.

The Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.*—This is an appeal from the order of the Subordinate Judge of Bezwada under the following circumstances. The petitioner decree-holder obtained a mortgage decree. In execution he brought to sale some only

*A. A. O. No. 483 of 1925. 25th February, 1927.

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of the mortgaged items and bought them in Court auction, and as the price fetched was enough to satisfy the decree, satisfaction was recorded. After the sales were confirmed, when the petitioner went to take possession of the properties he had bought, he was resisted by a stranger. His petition to remove obstruction and get delivery was dismissed. Thereupon the decree-holder filed the petition appealed from to set aside the satisfaction that had been entered up, as the judgment-debtor had no saleable interest in some of the properties sold and the petitioner had consequently failed to get possession. The Subordinate Judge relying on certain authorities held that the petition lay and allowed further execution to the extent of the sale price of the item in respect of which the decree-holder's petition to remove obstruction was disallowed. Hence the appeal.

This case has been elaborately argued and it may no doubt be dealt with in more than one aspect, but fortunately there is one recent authority which, if accepted, in my opinion, answers the question propounded. It will be noticed in the present case that the remedies ordinarily open to a person in the position of the decree-holder here are contained in O. 21, Rr. 91, 92 and 93, particularly 91, which enacts that the purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold. The period of limitation for this under Art. 166 of the Limitation Act is 30 days. It is not disputed that no action has been taken under the rule. The question is whether to have the sale set aside is the only remedy of the decree-holder and he being now too late his petition must be dismissed. It is said that there is here no petition to set the sale aside and therefore there can be no application of Art. 166. It is further said that the decree-holder cannot be said to be satisfied till possession is delivered, that it has not been decided as to when a decree-holder who is also an auction purchaser is satisfied, and further that either Article 181 or 182 of the Limitation Act applies because the right must accrue from the time when the application to remove obstruction was made in 1924. The present petition dated 3rd September 1924 asks that the Court shall issue sale notices in respect of certain items which remained unsold and for an order permitting the decree-holder to bid. There is no mention of the previous sale and it is true there is no prayer to

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set aside the previous sale in respect of the items possession of which was obstructed. If, however, the procedure under R. 91 is the only course open to the petitioner, it is obvious that the present method of attempting to circumvent this provision must be discouraged. *Muthukumarasamia Pillai* v. *Muthusami Thevan* (1) is a decision of Wallace and Madhavan Nair, JJ., and it is a case, to my mind, exactly on all fours with the present. In the present appeal it was attempted to be argued that the Court sale of the property which turns out not to belong to the judgment-debtor is void *ab initio* and therefore does not need setting aside. Wallace and Madhavan Nair, JJ., held that such a sale is not void but only voidable. They say:

"If the contention of the appellant were accepted, it would mean that a Court in selling property in execution gives a guarantee that the property sold is the property of the judgment-debtor which is opposed to one of the fundamental principles of Court sale."

In *Radha Kishun Lal* v. *Kashi Lal* (2) referred to and disapproved by the learned Judges the Court held that where a third person and a stranger has brought a suit to set aside the execution sale and obtained a decree, no formal setting aside of the sale as between the decree-holder and the judgment-debtor is necessary and further that O. 21 is not exhaustive of the procedure for setting aside an execution sale. The learned Judges refused to accept the Patna proposition that a decree-holder who purchases at a Court sale is in a more favourable position than a stranger auction purchaser and continue:

"In fact, it is one of the decree-holder's duties to see that the property sold was the property of his judgment-debtor, and if he makes a mistake he must take the consequence."

Further in support of this *Balvant Raghunath* v. *Bala* (3) held that where a Court auction-purchaser does not succeed in getting possession he must get the sale set aside on the ground that the judgment-debtor had no saleable interest in the property sold before he is entitled to an order for the re-payment of his purchase money and further that the limitation for the former of these steps is 30 days. In *Bihari Lal Misr* v. *Jagarnath Prasad* (4) the sale had already been declared to be a nullity. It was a question of limitation. In *Abinash Chandra Kar* v. *Bhuban Chandra Maiti* (5) a mortgagee purchasing under his decree was held not to be in any better or worse posi-

1. (1926) 52 M L J 148. 2. (1923) I L R 2 Pat. 829.
3. (1922) I L R 46 B 833. 4. (1906) I L R 28 A 651.
5. (1921) 25 C W N 756.

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tion than any other purchaser. It seems therefore to me that the refusal of the learned Judges in *Muthukumarasamia Pillai* v. *Muthusami Thevan* (1) to accept the authority of *Radha Kishun Lal* v. *Kashi Lal* (2) was well founded. The learned Judges in *Muthukumarasamia Pillai* v. *Muthusami Thevan* (1) also say that before the appellant can again apply to execute the decree which has been recorded as satisfied by the previous Court sale he must have the Court sale set aside. They also dealt with the contention that because the main relief sought is further execution the decree-holder is entitled to a larger period of limitation. There it seems the appellant actually put forward the analogy of a suit for possession by a person who cannot get possession unless he sets aside adoption. They hold that the appellant could not get round the limitation of 30 days merely by putting in a fresh execution application, no mention being made of the previous Court sale. The Subordinate Judge relied on *Bihari Lal Misr* v. *Jagarnath Prasad* (4) which is, as before stated, a case of limitation and it was a case of a sale of two villages being held to be a nullity and the decree-holder made an application to revive the previous application. It was held his right accrued when the sale was declared to be a nullity. It was a decision under the old Code, and there is, of course, no such declaration here. Another case relied on by the Subordinate Court was a decision *Keramat Ali* v. *Nagendra Kishore Ray* (6) of the Calcutta High Court, but the learned Subordinate Judge seems to have failed to note that the decree there was set aside. There again it was a case of limitation. The other case is the case of *Radha Kishun Lal* v. *Kashi Lal* (2) which was commented on and disposed of in *Muthukumarasamia Pillai* v. *Muthusami Thevan* (1).

The second point is about delivery of possession. Nothing is said in the relevant rules of the Code about it, and it seems to me that when a decree-holder has himself certified satisfaction to the Court he must be taken to have done so with all risks. We were referred to a case *Mathonkandi Kannan* v. *Thayyil Pakkutti Avvulla Haji* (7), a decision of Devadoss and Sundaram Chetty, JJ. Really what the learned Judges had to decide was whether an application for delivery of pro-

1. (1926) 52 M L J 148. 2. (1923) I L R 2 Pat. 829.
4. (1906) I L R 28 A 651. 6. (1916) 21 C W N 571.
7. (1926) 52 M L J 1.

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perty by a decree-holder purchaser is a step-in-aid of execution within Art. 182, cl. (5). They held that execution was not complete till the decree-holder obtains possession of the property purchased by him in execution of the decree. The learned Judges after elaborately examining the law on the point came to the conclusion that the decision in *Lakshmanan Chettiar* v. *Kannammal* (8) was sound. They further add:

"The contention that the moment he, *i.e.*, the decree-holder, buys the property of the judgment-debtor he ceases to be a decree-holder and assumes the capacity of a stranger purchaser is not supported by any authority."

I do not take this case to decide that the decree-holder who has been unable to obtain possession can proceed without more to execute the decree anew. The other cases cited for this proposition are to the same effect, namely, *Sariatoolla Molla* v. *Raj Kumar Roy* (9), *Lakshmanan Chettiar* v. *Kannammal*(8), *Babu Ram* v. *Piari Lal* (10) and *Rajagopala Aiyar* v. *Ramanujachariar* (11). In the last of these cases the sale was a nullity on the ground that no notice had been served but in respect of that there was an application to set it aside under S. 47, and it was held it was governed by Art. 181 and not Art. 166. In *Bhagwati* v. *Banwari Lal* (12) three out of five learned Judges of the Full Bench held that where an auction purchaser fails to obtain possession of the property purchased, he may claim possession by application under the Code or by suit. (This was under the old Code.) The case is only useful for the observation of Banerji, J. :

"That all auction purchasers, whether they are decree-holders or not, and whether they are purchasers under a mortgage decree or under a simple decree for money, are in the same position as regards recovery of possession of the property purchased by them and that it is only in their capacity as auction purchasers that they can obtain possession."

On the best consideration I can give to this case and the two questions that have been agitated before us, I can see no reason to hold that the decision in *Muthukumarasamia Pillai* v. *Muthusami Thevan* (1) is wrong or needs consideration. It seems to me that the decision covers the whole of this case, and all the arguments that have been advanced here have been examined in that case. I therefore think the learned Subordi-

1. (1926) 52 M L J 148.
8. (1900) I L R 24 M 185. 9. (1900) I L R 27 C 709.
10. (1919) I L R 41 A 479.
11. (1923) I L R 47 M 288: 46 M L J 104 (F B).
12. (1908) I L R 31 A 82 at 98 (F B).

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nate Judge was wrong and that the appeal must be allowed with costs.

Curgenven, J. :—This appeal is against an order of the Subordinate Judge of Bezwada allowing further execution of the decree in O. S. No. 33 of 1912 on his file. It was a mortgage decree, and some of the properties had already been sold under it, and bought by the decree-holder. Of these, he obtained delivery of all but four items, with regard to which he was obstructed, and a petition to remove the obstruction was dismissed on the ground that these items were not the property of the judgment-debtor. Therefore he filed the application to which the order now under relates, for the sale of other items included in the decree. The contention of the judgment-debtor, now the appellant, is that further execution cannot be taken, because the sale was confirmed and satisfaction of the decree entered, so that there is now nothing more to execute.

Under R. 91 of O. 21, Civil Procedure Code, a purchaser at an execution sale, whether he be the decree-holder or another, may apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. Art. 166 of the First Schedule of the Limitation Act allows him 30 days from the date of the sale within which to do this. If he does not present such an application, on the expiry of the 30 days, the Court, under R. 92 of the same order

"shall make an order confirming the sale, and thereupon the sale shall become absolute."

The terms of this rule were complied with in the present case. If the auction purchaser is other than the decree-holder, the sale price which the former has deposited is paid over to the latter; where the decree-holder and auction-purchaser are one, no payment, of course, has to be made; but in other cases where the sale has resulted in the satisfaction of the decree, entry is made accordingly. Here the decree-holder, having failed to apply under R 91, is now unable to get the sale set aside. The question which then arises for decision is whether, without having done so, he is at liberty, in the circumstances, to proceed with the execution of his decree.

This question has recently been considered by a Bench of this Court (Wallace and Madhavan Nair, JJ.) reported as *Muthukumarasamia Pillai* v. *Muthusami Thevan* (1) and has

1. (1926) 52 M L J 148,

been answered in the negative. An attempt has been made to distinguish that case on the ground that the decree-holder there applied not only for further execution but also to have the sale and record of satisfaction set aside, whereas here we have to deal only with an application for execution. But it is evident from what the learned Judges say that they considered whether execution could proceed notwithstanding no order setting aside the sale had been passed, and this is precisely the question which we have now before us. Thus there is no substance in the attempted distinction, and we have to decide whether we are to follow or differ from this decision. It will be convenient to consider how far the grounds upon which it is based have been successfully attacked before us.

The learned Judges deal first with, and reject, the contention that an execution sale of property not belonging to the judgment-debtor is void and without jurisdiction, so that it is not necessary to get it set aside before proceeding further with execution. Of the cases cited to us in support of this proposition one is *Bihari Lal Misr* v. *Jagarnath Prasad* (4), which is among those relied upon by the learned Subordinate Judge. Two villages were sold under a mortgage decree, and were purchased by the decree-holder. The amount for which he purchased them was sufficient to discharge the decree. The sale was confirmed and satisfaction entered. Subsequently in a suit filed by the purchaser of the judgment-debtor's interest before the Court sale, the High Court declared the latter sale void and set it aside. It was held that the decree-holder was entitled to proceed against the remainder of the mortgaged property as the sale which took place in regard to two items of property has been declared to be a nullity. It is added that no question relating to the applicability of S. 315 of the Civil Procedure Code (now O. 21, R. 93) arises. Now with regard to the former of these grounds, it is true that the sale had been declared to be a nullity, but the declaration was made at the instance of the real owner of the property, and it does not appear to me necessarily to follow that it would be available to a decree-holder who had failed to take advantage of the provisions of the Code to get the sale set aside. The real owner was no party to the execution proceedings, and nothing that was therein done or left undone would bind him. But unless we are to hold that no finality attaches to the Court's

4. (1906) I L R 28 A 651.

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order making the sale absolute, and that a decree-holder. auction-purchaser who, by sub-rule (3) of R. 92, is precluded from bringing a suit, may ignore it upon discovering that his judgment-debtor had no saleable interest, it is difficult to see why he should not be bound by the confirmation of the sale, whatever infirmity may subsequently appear in his title. The Code expressly lays upon him the necessity, or at least provides him with an opportunity to get the sale set aside where the judgment-debtor has no saleable interest, and the reasonable inference is that, if he does not do so, he must abide by the consequences. He cannot be heard to say, after it has been made absolute, that it is a nullity. To hold otherwise would, as the learned Judges point out in *Muthukumarasamia Pillai* v. *Muthusami Thevan* (1), imply that every Court sale is accompanied by a warranty of title. To put it another way, what is sold is the right, title and interest of the judgment-debtor, and even if this should turn out to be valueless, the sale is no less a sale for that reason.

Of the two other cases relied upon by the learned Subordinate Judge, he must have overlooked the circumstance that in *Keramat Ali* v *Nagendra Kishore Ray* (6) the decree itself was set aside, so that all proceedings subsequent to it were vacated. The case is thus no authority for the proposition in support of which it was invoked. In the remaining case *Radha Kishun Lal* v. *Kashi Lal* (2), it was indeed held that the effect of a decree obtained by a third-party claimant against the decree-holder (who had purchased the property) and the judgment-debtor was to set aside the sale, and that no formal order to that effect was required. This view has been criticised in *Muthukumarasamia Pillai* v. *Muthusami Thevan* (1) and I am in general agreement with what has been there said about it. I have suggested above the objections which I feel to allowing a decree-holder or, more properly, an auction-purchaser to call in question the effect of a sale which has already been made absolute.

The respondent has endeavoured to advance his argument by the citation of cases which support the view that although a sale has been confirmed, the decree is not satisfied until the decree-holder, where he is himself the auction-purchaser, has obtained delivery of the property purchased. Authority for

1. (1926) 52 M L J 148. 2. (1923) I L R 2 Pat. 829.
6. (1916) 21 C W N 571.

this position is to be found in *Moti Lal* v. *Makund Singh* (13), *Sariatoolla Molla* v. *Raj Kumar Roy* (9), *Lakshmanan Chettiar* v. *Kannammal* (8), *Babu Ram* v. *Piari Lal* (10) and *Mathonkandi Kannan* v. *Thayyil Pakkutti Avvulla Haji* (7). The question which arose in these cases was whether an application for delivery under O. 21, R. 95 is a step-in-aid of execution. In the case last cited Devadoss and Sundaram Chetty, JJ., have summarised the effect of the case-law originating in this Court, and have come to the conclusion that the balance of authority is in favour of the proposition. But although such an application for delivery may be defeated by the resistance of a third party, that does not imply, having regard to the provisions of the Code, that the decree-holder can proceed to execute his decree anew.. The learned Judges in the case last referred to meet the objection that the decision at which they arrived involved a confusion of decree-holder with auction-purchaser by saying "The contention that the moment he (the decree-holder) buys the property of the judgment-debtor he ceases to be the decree-holder and assumes the capacity of a stranger purchaser is not supported by any authority. When the law prescribes a certain course to be pursued by the decree-holder even when he becomes the purchaser of the property, it is not open to rely upon the expression in Art. 138 of the Limitation Act, and to hold that his capacity as decree-holder ceases the moment he becomes the purchaser in Court sale."

If I may respectfully comment upon these observations in so far as they are fairly applicable to the present circumstances, the course which the law prescribes is set out in R. 94 of O. 21, and it is prescribed not to the decree-holder but to the auction-purchaser.

Qua decree-holder the rule does not affect him. In the words of Banerji, J., in *Bhagwati* v. *Banwari Lal* (12) "the decree-holder as such is not entitled to possession as the decree does not award possession. It is only in his capacity as auction-purchaser that he can apply for and obtain possession. In this respect his position is no better and no worse than that of any other purchaser."

It appears to me that there is much to be said for this view. Our attention has not been drawn to any provisions of

7. (1926) 52 M L J 1. 8. (1900) L R 24 M 185.
9. (1900) I L R 27 C 709.
10. (1919) I L R 41 A 479. 12. (1908) I L R 31 A 82.
13. (1897) I L R 19 A 477.

Jagannadha Rao v. Basavayya.

Curgenven, J.

the Code which distinguish a decree-holder auction purchaser from a stranger auction purchaser in respect of his rights as auction purchaser. I infer from this circumstance that no such distinction is intended. Suppose immoveable property is sold in satisfaction of a money or of a mortgage decree, and the purchaser as here does not apply within 30 days to have the sale set aside. If he is other than the decree-holder, he deposits the money, if he is the decree-holder it is unnecessary for him to do so, the one sum being set off against the other under O. 21, R. 12 (2), C. P. C. In either case the sale is confirmed, and satisfaction of the decree is entered. As soon as such entry is made, the decree-holder as decree-holder is settled with, and if any further difficulty arises he has to meet it under the provisions relating to auction-purchasers. Upon this view it is impossible to hold that any further opportunity to take out execution remains, for so to hold would mean that it was the auction purchaser and not the decree-holder to whom such a step was open. It is purely business of the purchaser to obtain his sale certificate under R. 94 and to apply for delivery under R. 95 or 96. If he is resisted the succeeding rules provide him with a remedy in the shape of an inquiry into and adjudication by the Court upon the title of the person resisting and if he is dissatisfied with the result, the purchaser may institute a suit under O. 21, R. 103, Civil Procedure Code.

Although this principle in some of its implications may not have been invariably followed to its logical extremity, it may, I think, be adopted at least so far as to negative the somewhat startling proposition under consideration that a decree-holder who has in effect received payment and whose decree has been recorded as satisfied may, upon a defect in the judgment-debtor's title appearing, re-open his decree and proceed to obtain further satisfaction of it. So adopting it, I see no reason to dissent from the decision in *Muthukumarasamia Pillai* v. *Muthusami Thevan* (1) and I would accordingly allow the Civil Miscellaneous Appeal and dismiss the application with costs throughout.

N. S. *Appeal allowed.*

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1. (1926) 52 M L J 148.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Chitrala Ramiah ... *Petitioner** (*1st Accused in Preliminary Register Case No. 4 of 1926 on the file of the Court of the 2nd Class Magistrate of Giddalore*)

v.

Natukula Ramiah and another ... *Respondents* (*Complainant and 2nd Accused in do.*).

Criminal case—Stay of, pending civil suit—Rule as to—Refusal of stay by Lower Court—Interference with, by High Court in revision.

Chitrala Ramiah v. Natukula Ramiah.

There is no invariable rule that when the same issue is agitated both on the civil and the criminal side, the civil shall take precedence of the Criminal Court. Each case must be considered on its own merits and the only general rule that can be adumbrated is that every Court shall be left as far as possible to dispose of the cases on its file with the utmost expedition.

The High Court will not ordinarily interfere, if the Court refusing to act under S. 344, Criminal Procedure Code, has exercised a judicial discretion.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing stay of proceedings in Preliminary Register Case No. 4 of 1926 on the file of the Court of the 2nd Class Magistrate of Giddalore pending disposal of O. S. No. 148 of 1926 on the file of the Court of the District Munsif of Markapur and for interim stay of the same pending disposal of this petition.

K. B. Ranganatha Aiyar for petitioner.

K. Krishnaswami Aiyangar for 1st respondent.

The Court delivered the following

ORDER :—The petitioner, an accused in P. C. No. 4 of 1926 on the file of the Stationary Sub-Magistrate, Giddalore, applied for stay of that criminal proceeding during the pendency of O. S. No. 148 of 1926 which he subsequently instituted in the Court of the District Munsif of Markapur. The Sub-Magistrate refused the application and hence this petition.

Applications of this sort are sometimes argued as if there were an invariable rule that when the same issue is agitated both on the civil and the criminal side, the civil shall take precedence of the Criminal Court. This is not so. Each case must be considered on its own merits and the only general rule that can

*Cr. M P No. 308 of 1926. 3rd August, 1926.

Chitrala Ramiah v. Natukula Ramiah.

be adumbrated is that every Court should be left as far as possible to dispose of the cases on its file with the utmost expedition. This rule is in the interests not only of public administration but also of private persons involved in criminal proceedings for no one wishes to have a criminal charge kept hanging indefinitely over his head. If authority were required for the above proposition there is a Patna ruling: "It is the policy of the law to go on immediately with the enquiry", *Ram Saran Singh* v. *Nikhad Narain Singh* (1), which is founded on *Sheikh Bahadur* v. *Nobad Ali* (2). Another Patna ruling on which the petitioner relies *Phuleshra Kuer* v. *Emperor* (3) proceeds on the assumption that there may be manifest and irreparable injustice done in the Criminal Court, but, with all respect, I do not think that such an assumption can properly be made when the integrity of the Court is not impugned. It must be assumed that in either Court justice will be done and which Court precedes the other is merely a question of convenience. Of course, in those cases arising out of a disputed title on which it is difficult to draw the line between *bona fide* claim and criminal trespass, if the title is already the subject-matter of a civil suit, before the institution of criminal proceedings, it may be advisable for the criminal to abide the civil trial; this is laid down in *Khobhari Rai* v. *Bhagwat Rai* (4) and relied upon by the petitioner, but the facts are far removed from those of his case.

I have considered the petition on the merits, but this Court will not ordinarily interfere, if the Court refusing to act under S. 344, Criminal Procedure Code, has exercised a judicial discretion. This too is laid down in *Ram Saran Singh* v. *Nikhad Narain Singh* (1).

The petition is dismissed.

A. S. V. *Petition dismissed.*

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1. A I R 1925 Patna 619 at 621. 2. (1924) 28 C W N 487.
3. (1920) 62 I C 185 : 1 Pat L T 697. 4. (1917) 41 I C 147.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Dantuluri Venkatanarasimha Raju and another ... *Appellants** (*Plaintiffs*)

v.

Dantuluri Chandrayya and others ... *Respondents* (*Defts.*).

Venkatanarasimha Raju *v* Chandrayya.

Court-Fees Act, S. 7 (iv) (a), Art. 17 (a)—Applicability—Hindu Law—Reversioners—Decree affecting immoveable property against, and against widow—Suit to set aside during widow's lifetime—Court-fee in case of—Value of property in S. 7 (iv) (a)—Market value—Subject-matter of decree.

The value contemplated in S. 7 (*iv*) (*a*) of the Court-Fees Act is not the market value.

Where a decree affecting immoveable property is sought to be set aside, the subject-matter of that decree is the value of the immoveable property in that suit. In such a case the statutory value should be adopted and not the market value of the property.

When there is in the Court-Fees Act itself a special rule as to valuing the property in suits for Court-fees, it is proper to take that method of valuation in preference to any method to get the value where there is no indication that any other method should be adopted.

Where reversioners seek to set aside a decree to which they and the widow were parties and which is binding on them so long as it is not set aside, and the widow is alive at the date of their suit, the case falls under S. 7 (*iv*) (*a*) and not under Art. 17 (*a*) of Schedule II to the Court-Fees Act on the ground that, so long as the widow lives, the interest of the reversioners could not be properly ascertained.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in O. S. No. 27 of 1922.

T. M. Krishnaswami Aiyar for *N. Rama Rao* for appellants.

P. Somasundaram for 2nd respondent.

Venkatachariar for *K. Venkatrama Raju* for 4th and 5th respondents.

M. Ramachandra Rao for 10th respondent.

The Court delivered the following

ORDER :—The office has now submitted its report and, according to it, the appeal should be valued so far as it seeks to set aside the decree in O. S. No. 46 of 1908 at Rs. 3,37,391 and the Court-fee on it is Rs. 3,502-7-0. This value is arrived at excluding the moveable property in the suit

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*Appeal No. 216 of 1923. 13th December, 1926.

Venkatanarasimha Raju v. Chandrayya.

as no relief is asked with reference to it but calculating the value of the immoveable property under S. 7 (v) (b) at ten times the revenue. It is clear that the appellants are asking for the decree to be set aside and the subject-matter of that decree so sought to be set aside is the whole of the immoveable property in that suit.

One point raised is whether the market value of the property should not be taken for the purpose of this valuation or whether the statutory value should be adopted. We think the latter is the proper course as there is nothing in the Act to show that the market value is the value contemplated in S. 7 (iv) (a). When there is in the Act itself a special rule as to valuing the property in suits for Court-fees, we think it is proper to take that method of valuation in preference to any method to get the value where there is no indication that any other method should be adopted.

It was also argued that as the present claim is by a reversioner who is not concerned to have the decree set aside so long as the widow lives, it should be treated as a claim to set aside a part of the decree only and not the whole of it and that as the exact value of the widow's life interest cannot properly be estimated 17 (b) of the Second Schedule should be applied to the case and not S. 7 (iv) (a). We are unable to agree with this contention. The decree cannot be treated as consisting of separate and independent parts with reference to the widow and the reversioner. Appellants were parties to the decree and it is binding on them so long as it subsists. Whether it be at once or after the widow's death that the cancellation of the decree will enure to their advantage, it is the whole decree they must get cancelled if they want such a relief and not a part of it. It seems therefore that they must pay an additional stamp duty of Rs. 3,302-7-0 on this appeal memo and we direct them to pay that amount in one month from this date.

A. S. V. *Court-fee question answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

V. R. S. S. Chidambaram Chettiar... *Petitioner** (1*st Deft.*)

v.

P. L. N. K. Subramaniam Chettiar and others ... *Respondents* (*Plaintiff —supplemental 2nd plaintiff—supplemental 3rd plaintiff and defendants* 2, 3, 4 *and* 5).

Civil Procedure Code, O 1, R. 10—Addition of plaintiff—Discretion of Court—Interference with, in revision—Real owner under sale-deed—Question as to, in suit by plaintiff against defendant—Third person claiming to be real purchaser thereunder—Addition of, as plaintiff under O. 1, R. 10 —Validity.

Chidambaram Chettiar *v.* Subramaniam Chettiar.

The plaintiff sued for a declaration that a sale-deed was obtained by 1st defendant *benami* for the plaintiff's benefit, and for possession and mesne profits. The 1st defendant pleaded that the property was bought by him in his own right. Plaintiff claimed to have had temporary possession through his agent, *S*, whom the defendant ejected, but the defendant alleged that *S* was his own agent. Then *S* applied to be made a party to the suit along with another, alleging that the 1st defendant was benamidar for all three of them, plaintiff and the two new parties. The Lower Court ordered *S* to be added as a plaintiff under O. 1, R. 10, Civil Procedure Code.

Held, that O. 1, R. 10, Civil Procedure Code, did not justify the addition of *S* as a plaintiff.

S's claim to the suit property could not possibly be said to be involved in the suit between the original plaintiff and the 1st defendant. The matter to be adjudicated in that suit is whether the 1st plaintiff or 1st defendant is the real purchaser under the sale-deed. If some third party wishes to claim that he is the real purchaser adversely to the pleas of both plaintiff and defendant, he must file his own suit.

Circumstances justifying joinder of plaintiffs under O. 1, R. 1 and under O. 1, R. 10 discussed.

A Court has a large discretion under O. 1, R. 10, and any attempt to diminish that discretion ought to be deprecated.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Trichinopoly dated 26th August, 1926 in I. A. No. 211 of 1926 in O. S. No. 288 of 1925.

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*C R P No. 743 of 1926. 8th March, 1927.

Chidambaram Chettiar v. Subramaniam Chettiar.

K. Rajah Aiyar and *R. Sundaralingam* for petitioner.

C. V. Ananthakrishna Aiyar and *T. V. Muthukrishna Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—Petitioner seeks to revise the order of the District Munsif of Trichinopoly in I. A. No. 211 of 1926 adding a second plaintiff to a suit under O. 1, R. 10.

A Court has a large discretion under this order, and I should deprecate any attempt to diminish that discretion by substituting special pronouncements in special cases for the actual language of the rule. The Court may add any person whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. A question involved in a suit is a question which will come out when the case is opened.

In *Montgomery* v. *Foy* (1) a shipowner was not paid his freight by the shipping agents, so he put the cargo in a warehouse with notice that it was subject to a lien for freight. The agents deposited the amount under protest. The shipowner sued for the deposit. Then the real owners of the cargo for whom the shipping agents were acting asked to be made defendants as they had counter-claims to advance for damages for short delivery and injury to cargo. The plaintiff objected that his cause of action only lay against the agents who were bound to pay his freight and the owner's claim was an extraneous matter; nor could a plaintiff be compelled to join as defendants a person whom he did not wish to sue. Lord Esher ruled that where there is one subject-matter out of which several disputes arise, all parties may be brought before the Court, and all those disputes may be determined at the same time without the delay and expense of several actions and trials.

Kay, L. J., agreed on the ground that if there had been two separate suits between the shippers and owners and between the shippers and agents, such suits would have been tried together to decide what was due to the shippers. As put by Smith, L. J., the whole matters in dispute arise under the one contract of affreightment.

Lord Esher again in *Byrne* v. *Brown* (2) observed:

"It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence, and the main inquiry, will be the same."

1. (1895) 2 Q B 321. 2. (1889) 22 Q B 657.

Chidambaram Chettiar v. Subramaniam Chettiar.

Vidyanatha v. *Sitarama* (3) expressly guards against the gloss adding after questions involved in the suit, ***between the parties to that suit,*** and rules that a material question common to the parties and to third parties should be tried once for all.

In the present case the plaintiff sues for a declaration that a sale deed was obtained by 1st defendant *benami* for the plaintiff's benefit and for possession and mesne profits.

The 1st defendant pleads that the property was bought by him in his own right. Plaintiff claims to have had temporary possession through his agent Sundaram Pillai whom the defendant ejected, and the defendant retorts that Sundaram Pillai was his own agent.

Then this Sundaram Pillai applied to be made a party to the suit along with one Ramalingam Pillai, alleging that the 1st defendant was benamidar for all three of them, plaintiff and the two new parties.

The learned District Munsif has ordered that Sundaram Pillai, and not Ramalingam Pillai, be joined as plaintiff, because

"he appears to be as much interested as Subramaniam Chetti, the original plaintiff."

This is to introduce a line of reasoning quite foreign to O. 1, R. 10.

If *A* and *B* severally claim property they cannot bring a joint suit merely because the property is the same. There must be a common question of fact. The fact according to the first plaintiff is that he is the sole owner of the property, and the new plaintiff is his agent. The fact according to the new plaintiff is that he is part owner of the property, and a joint principal with the first plaintiff. The Code does not contemplate a triangular duel of this sort in which one plaintiff shoots at the other, and both at the defendant. And if joinder of plaintiffs is impossible under O. 1, R. 1, it does not become possible under O. 1, R. 10.

But under this latter provision two parties may be joined in a suit to settle all the questions involved in the suit. Is the question of the new plaintiff's claim involved in the suit between the 1st plaintiff and the 1st defendant? They are both agreed that he is an agent, though they happen to be disputing whose agent he is, and neither admits that he has any claim to the property. It is difficult to see therefore how the question

3. (1881) I L R 5 M 52.

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of his claim could possibly be involved in the suit. It is as though a landlord sued in ejection, and an entire stranger sought to intervene as owner whom the landlord did not recognise, and to whom the tenant did not attorn. His claim would not be involved in the suit.

Applying the English rulings to these circumstances, it cannot be said that the main evidence will be the same; and it cannot be said that 1st plaintiff's alleged purchase through 1st defendant as his benamidar is subject-matter out of which the new plaintiff's dispute arises.

Nor is the learned District Munsif labouring under any such impression; the real reason for his order is that the first plaintiff has been adjudicated insolvent, the 2nd plaintiff is the Official Assignee, and the insolvent cannot be expected to keep the Official Assignee informed in the same manner as Sundaram Pillai. This if it means anything at all presumably means that it is more convenient for the Official Assignee to have a solvent plaintiff, than to finance the litigation out of the insolvent's estate; but such a consideration is quite irrelevant to the question.

The matter to be adjudicated in the suit is whether the first plaintiff or first defendant is the real purchaser under the sale deed. If some third party wishes to claim that he is the real purchaser adversely to the pleas of both plaintiff and defendant, he must file his own suit.

The petition is allowed with costs payable by 3rd respondent and the order of the Lower Court is cancelled.

A. S. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

The Mylapore Hindu Permanent Fund, Ltd. ... *Plaintiff**

v.

A. N. Sabapathi Chetti and another .... *Defendants.*

Mylapore Hindu Permanent Fund, Ltd. v. Sabapathi Chetti.

Interpretation of Statutes—Incorporation by reference—Intention of parties—Articles of Association of a Fund—Special loan to a share-holder —Provision for enhanced interest after a certain period—Execution of a pro-note by share-holder and his son—No provision for enhanced interest in pro-note—Suit claiming enhanced interest filed more than 3 years after the date of the note but within 3 years of the expiry of the period fixed for the commencement of the enhanced rate of interest—Limitation—Right to enhanced interest—Liability of the son—Enhanced rate if a penalty.

* C. S. No. 345 of 1925. 12th November, 1926.

Mylapore Hindu Permanent Fund, Ltd. v. Sabapathi Chetti.

The Articles of Association of the plaintiff-Fund provided that loans shall be of two kinds "ordinary" and "special". Loans can be granted only to the share-holders subject to the terms and conditions contained in the Articles of Association. A special loan may be on "share basis" or "on non-share basis". Whereas in the case of "ordinary loans" they may be either simple or mortgage, in the case of "special loans" they may be granted only on mortgage of immoveable property or pledge of Government promissory notes, jewels or gold and silver articles, and a mortgage of immoveable property may be created by deposit of title-deeds. A special loan was repayable within three years and it carried interest at 7 per cent. during that term and after the expiry of the three years interest was payable at 12½ per cent. per annum on the amount of the principal and interest then due. The Articles contained no provision for a special loan being evidenced by a promissory note. But R. 12 of Part II of the Bye-laws framed by the Fund provided that "applicants for loan on deposit of title-deeds shall execute promissory notes in *printed forms* supplied free at the office". The first defendant who was a share-holder in the plaintiff-Fund applied for a special loan and the same was granted. Besides the deposit of the title deeds, the 1st defendant and his son the 2nd defendant were also required to execute a promissory note containing two distinct provisions (1) that the amount was payable on demand, and (2) that it was payable with interest at 7 per cent. per annum, and the promissory note was executed in 1920 containing as the heading the words "special loan on deposit of title-deeds". The plaintiff-Fund sued to enforce the equitable mortgage in 1925 and claimed that, although in the promissory note the interest payable was 7 per cent. per annum, it was entitled to charge interest at 12½ per cent. per annum upon the expiry of three years from the date of the note.

Held, (1) that the effect of the words "special loan on deposit of title-deeds" being written across the promissory note was to incorporate into it all the provisions in the Articles relating to "special loans" and the real bargain was to be found in the Articles, that the promissory note was a mere formality and that therefore the plaintiff was entitled to a decree;

(2) that the 2nd defendant by signing the note which contained the words "special loan" must be deemed to have been aware of the real contract between the 1st defendant and the Fund and made himself liable for the obligations under that contract and consequently was also liable for the enhanced rate of interest;

(3) that the suit was not barred by limitation as the plaintiff's right to sue accrued only on the expiry of the three years from the date of the note and not earlier, and

(4) that the term relating to enhanced rate of interest was not a penalty.

The rule of incorporation by referring words is a rule of construction. If the term to be incorporated is at clear variance with a term in the main document itself, it is the latter term that must prevail and not the former. The question in each case is one of intention.

Mylapore Hindu Permanent Fund, Ltd. v. Sabapathi Chetti.

A. Venkatasubbu Mudaliar and *V. Ganapati* for plaintiff.

K. P. Ramakrishna Aiyar and *P. V. Sudarsana Rasu* for defendants.

The Court delivered the following

JUDGMENT :—This case raises a question of law of some importance. The plaintiff-Fund seeks to enforce an equitable mortgage. The 1st defendant is the father of the 2nd defendant, and they form members of an undivided Hindu family. On the 27th of March, 1920, the defendants executed in favour of the plaintiff-Fund a promissory note for Rs. 9,000 agreeing to repay the sum, on demand, with interest at 7 per cent. per annum. The defendants deposited with the Fund the title-deeds of the house described in the plaint with a view to create an equitable mortgage over the property. On the 7th of December, 1920, they borrowed from the plaintiff a further sum of Rs. 600 and executed another promissory note with terms similar to those contained in the first note. They agreed that the property already mortgaged should be treated as security for this further loan.

The 1st defendant is a share-holder of the plaintiff-Fund, and the terms on which the Fund can make loans are governed and regulated by its Articles of Association. The plaintiff claims that, although in the notes the interest payable is 7 per cent., it is entitled to charge interest at 12½ per cent. per annum upon the expiry of three years from the dates of the notes. The question to be decided is—and this is the only question raised in the suit—is the plaintiff entitled to this enhanced rate of interest?

The Articles provide that loans shall be of two kinds, "ordinary" and "special". Loans can be granted only to the share-holders subject to the terms and conditions contained in the Articles of Association (Articles 12 and 13). It will thus be seen that the Fund can advance loans only to its share-holders, and that the loans can be made only subject to the Articles of Association.

"Special loans" are described in Articles 30 to 35. A "special loan" may be on "share basis" or on "non-share basis". The loans in the present instance were made on "share basis". Whereas in the case of "ordinary loans" they may be either simple or mortgage (Article 15), in the case of "special loans" they may be granted only on mortgage of immoveable property, or pledge of Government promissory notes, jewels or gold and

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silver articles. It is further explained that a mortgage of immoveable property may be created by deposit of title-deeds (*see* Article 30, which is not happily worded).

Then we come to an important Article—Article 33—the relevant portion of which runs as follows:—

"Subject to the other terms in the instrument of mortgage for demanding re-payment before the period fixed therefor, special loans are repayable within three years."

Article 43 says that "on any balance of special loan and interest remaining payable after it falls due under Article 33, interest at 2 pies per rupee per month (in other words, 12½ per cent. per annum) is payable."

So far it will be seen that the Articles contain no provision for a "special loan" being evidenced by a promissory note. Under the Articles a "special loan" is "repayable within three years" and it carries interest at 7 per cent. during that term and after the expiry of the three years interest is payable at 12½ per cent. on the amount of the principal and interest then due. The plaintiff's claim to interest is based on these various Articles of Association.

In accordance with the Articles, the 1st defendant who was a share-holder applied in due form for the loan. In his application he mentioned that the loan he wanted was a "special loan". The Directors sanctioned the loan, and it must be taken that it was sanctioned on the basis of the loan application and subject to the Articles of the Fund. If the matter stopped at this point, there would have been no difficulty. But what really happened was, that not only were the title-deeds deposited in pursuance of the Articles, but the 1st defendant was also required to execute a promissory note containing two distinct provisions, (1) that the amount was payable on demand, and (2) that it was payable with interest at 7 per cent. In both these respects there is a deviation from the Articles of Association. R. 12 of Part II of the Bye-laws framed by the Fund provides that "applicants for loan on deposit of title-deeds shall execute promissory notes in *printed forms* supplied free at the office." One other point to notice is, that each of the promissory notes executed by the defendants contains as the heading the words "Special loan on deposit of title-deeds".

The question to be decided is, what are the legal consequences that follow from these words being written across the notes? The effect of the referring words is to incorporate into

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the document all the provisions in the Articles relating to "special loans". The question has, therefore, to be decided on the footing of there being one document which contains the terms in the Articles as well as those expressly mentioned in the note. The rule of incorporation by referring words is a rule of construction. But it is obvious that if the term to be incorporated is at clear variance with a term in the main document itself, it is the latter term that must prevail and not the former. The question in each case is one of intention and it cannot reasonably be presumed that, when the parties make a distinct provision in the main document, they intended that that term was to be subject to, and directly contradicted by, a term in the subsidiary document, the terms of which have become a part of the bargain only by force of the referring words. I am, therefore, clearly of the opinion that, if there is evidence of an intention to depart from the Articles, it is the terms of the promissory note that must be enforced and that we cannot look at the terms of the Articles where they are at variance with the terms of the note. But in this case it seems to me that the real bargain is to be found in the Articles and that the promissory note is a mere formality. In the first place, the Fund is bound by its Articles of Association and it cannot grant a "special loan" payable on demand. It can curtail the period only "subject to the other terms in the instrument of mortgage for demanding repayment before the period fixed therefor" (Article 33). As in the present instance there was no instrument of mortgage, the Fund was not competent to make the loan repayable otherwise than provided in Article 33. The 1st defendant as a share-holder knew that it would be *ultra vires* the Directors to grant a loan except on terms mentioned in the Articles of Association. They constitute a contract between each member and the Company and they bind the Company and the share-holders alike. Secondly, there can be no doubt that the parties regarded the promissory note as a mere formality. Article 12 of the Bye-laws says that a promissory note shall be executed "in a *printed form* supplied free at the office". It cannot be regarded that the parties deliberately intended to depart from the Articles while they used special words to import them into, and incorporate them, in the final document. The bargain became complete without the promissory note, and the Articles, as I have shown, do not contemplate a promissory note being executed at all. It is the Bye-laws that provide for the execution of such a note and

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the reference to "printed forms supplied free" shows that the note was merely regarded in the light of an additional voucher.

I may mention that the same view as I am taking was taken by Srinivasa Aiyangar, J., in some cases heard by him between the present plaintiff and certain third parties, although the grounds of my decision are somewhat different from the reasons given in the judgments of that learned Judge.

The case may be disposed of also on a short ground. When the Fund made demands after the due date, the 1st defendant wrote agreeing to pay the amount claimed, which included interest at the higher rate. There was consideration for the promise to pay enhanced interest as the 1st defendant asked for time and the Fund granted time and refrained from suing.

The 2nd defendant, so far as the promissory notes are concerned, must be regarded as surety and his liability is, therefore, co-extensive with that of the principal debtor. By signing the notes which contain the words "special loan," he must be deemed to have been aware of the real contract between the 1st defendant and the Fund and made himself liable for the obligations under that contract. The 2nd defendant is also, therefore, bound to pay the enhanced rate of interest.

An argument has been advanced that, if the Articles as well as the promissory note constitute the contract between the parties, the equitable mortgage cannot be proved as the various documents constituting the contract have not been registered under the Registration Act. This is a plea not taken in the written statement and, as indicated in *Krishnaiya* v. *Ponnuswami Aiyar* (1) the question involved is a mixed question of law and fact. I cannot, therefore, allow this plea now to be raised for the first time.

The only defence directly raised is that which relates to enhanced rate of interest. This indirectly raises the question of limitation, for the promissory notes were executed in 1920 and the plaint was presented in 1925. The suit regarded as one merely on the promissory notes will be clearly out of time; but, if as I have held, the contract between the parties is contained also in the Articles of Association, the plaintiff's right to sue accrued only on the expiry of the three years from the dates of the notes. Article 33 says that special loans "are repayable within three years." Under this clause the defendants have an option to repay the amount at any time during a

1. (1923) I L R 47 M 398 ; 46 M L J 295.

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period of three years commencing from the execution of the notes. It was open to the defendants to pay the sum or any part of it earlier; but, so far as the Fund was concerned, it could not demand payment before the expiry of the 3 years. For instance, if the Fund claimed the amount, say at the end of two years, the defendants could have said in answer, "The clause gives us the option to pay the amount at any time within the three years. We do not propose to make any payment now." That would be a complete answer. Although the point of limitation has not been directly raised, I have considered the point and have come to the clear conclusion that the suit is not barred by limitation.

Another contention advanced by the defendants requires notice. It is argued that the term relating to enhanced rate of interest cannot be enforced as it is in the nature of a penalty. I cannot accept the contention. The original rate of interest is 7 per cent. and, if the amount is not paid on the due date, the sum then payable carries interest at 12½ per cent. simple, not compound. It is common knowledge that 12½ per cent is not an exorbitant rate. The mere fact that the higher rate is to be calculated on the total amount due (principal and interest) cannot make the term a penal term.

In the result there will be a mortgage decree against both the defendants for Rs. 14,428-8-3 and costs of the suit. Time for redemption three months.

N. S. *Suit decreed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—VISCOUNT SUMNER, LORD SHAW AND LORD DARLING.

Kaikhushroo Rustomji Wallace ... *Appellant* (Plaintiff)*

v.

The Bombay Company, Limited ... *Respondents (Defts.).*

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Commission due to a salesman—Percentage of nett profits as shown in the books of the employers

Under the terms of a written agreement the plaintiff, a former salesman in the employ of the defendants, was entitled by way of remuneration to a commission reckoned on a certain percentage of the nett profits, as shown in the books of the defendants, on all sales effected by the

* P. C Appeal No. 57 of 1926. 28th June, 1927.

plaintiff. In a suit brought by the plaintiff to recover commission due to him on the basis of the said agreement, he challenged the method upon which the defendants' profits were worked out in their books. There was, however, no allegation by the plaintiff that the defendants' books were improperly kept, or that the defendants had ascertained their profits in some arbitrary or capricious method.

Held, that in the absence of any evidence that the defendants' system of book-keeping was otherwise than reasonable and sound for its own purposes, the plaintiff was bound by the amount of the nett profits as shown in the books of the defendants.

Judgment of the High Court affirmed.

Appeal (No. 57 of 1926) by special leave from a judgment of the High Court, Bombay (Sir Norman MacLeod, Chief Justice and Mr. Justice Coyajee), dated the 6th October, 1925, substantially affirming a judgment of the same Court (Mr. Justice Kemp) in its Ordinary Original Civil Jurisdiction, dated the 17th December, 1924.

The appellant was the plaintiff in an action brought by him on the 20th December, 1923 in the High Court, Bombay, against the respondents, claiming the sum of Rs. 95,556-0-5 and interest thereon as commission due to him under an agreement dated the 9th February, 1920. The main questions raised in the appeal before the Judicial Committee were as to the construction of the said agreement and as to the extent to which the plaintiff could dispute the defendants' calculations.

The plaintiff down to February, 1920 was a salesman in the employ of the defendants and had been so employed for 26 years. Since 1908 he had been entitled to a commission reckoned by way of a percentage of the nett profits on sales made by him. Disputes having arisen between the plaintiff and the defendants as to the said commission, the plaintiff left the service of the defendants on the 7th February, 1920, and the said disputes were compromised on the terms of a letter from the defendants to the plaintiff, dated the 9th February, 1920, the material parts of which are set out in their Lordships' judgment. The present dispute relates only to the commission due under the said agreement for the period 1st August, 1919 to 7th February, 1920. The defendants by a letter dated 2nd January, 1923 stated that the commission due to the plaintiff for the said period amounted only to Rs. 12,845-11-11; the plaintiff being dissatisfied therewith obtained inspection of the books of the defendants by his accountants who calculated that the percentage due to the plaintiff was Rs. 95,556-0-5.

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MacLeod, C. J., in delivering the judgment of the Court of Appeal, observed :—

"At the hearing (of the suit) the defendants having argued that the plaintiff was bound under the agreement to accept the figure of net profits as stated in their books, the Judge (Mr Justice Kemp) was inclined to accede to this construction of the agreement, but thought it incumbent on the defendants to show that those net profits had at any rate been ascertained on some reasonable method and not arbitrarily or capriciously. He therefore considered it advisable to take all the issues together and deal with the whole evidence in the case. He failed to observe that it had never been suggested by the plaintiff that the defendants had calculated their profits on some arbitrary or capricious method or, to quote the hypothetical instance suggested by the Judge, had debited the Profits and Loss Account with such items as payment to charity which none would consider the defendants would be entitled to do. There was no issue on the point, so there was nothing for the defendants to prove to meet it. The plaintiff's whole case was that for the purpose of calculating the profits he was not to be bound by the method on which the defendants kept their books; he was entitled to ask the Court to hold that the method he suggested was the proper method and to order an account to be taken on that basis. A very great deal of evidence was taken to explain how the defendants kept their books, and to prove that the defendants' method was wrong and the plaintiff's method was right. The Judge after considering this evidence came to no definite conclusion thereon, as he considered the matter permitted a simpler solution. The defendants' letter of the 9th February, 1920 contained a very important stipulation. The net profits were to be accepted as shown in the books of the Bombay Branch of the Bombay Company, Limited as accruing from the sale of goods for which the plaintiff was salesman. The plaintiff was therefore bound to accept the system of book-keeping adopted by the defendants. If the Judge had decided at the commencement what construction was to be put on the agreement of February, 1920 the voluminous evidence which he recorded would have been unnecessary"

"Very shortly put, under that agreement the plaintiff was bound to accept the profits shown in the defendants' books unless he could falsify the account........ As it was never suggested in the pleadings that the defendants' books were improperly kept, and consequently no issue to that effect could be raised, the only question to be decided was the construction of the agreement.......... It was agreed that the accounts as prepared by the defendants in their final forms contained no arithmetical mistakes and that the figures in the business books of the defendants were correct apart from questions of principle on which the parties were at issue........ When the plaintiff agreed to accept a percentage of the net profits as shown in the company's (defendants') books, he must be taken as having agreed to accept the profits as shown in the books. He could not possibly dictate to the defendants how they were to keep their books nor in case of a dispute could he ask the Court to determine what was the proper system on which the defendants' accounts should be made up."

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The plaintiff moved the Court of Appeal (MacLeod, C.J. and Coyajee, J.) for leave to appeal to His Majesty in Council against their judgment, but the Court of Appeal on the 25th November, 1925 refused to the plaintiff leave so to appeal. The plaintiff thereupon applied to His Majesty in Council for special leave to appeal, and leave was duly granted.

Wilfred N. Greene, K. C. and *Hon. S. O. Henn-Collins* for appellant.

Sir G. R. Lowndes, K. C. and *E. B. Raikes* for respondents.

28th June, 1927. The Judgment of their Lordships was delivered by

Viscount Sumner.

VISCOUNT SUMNER.—This action was brought by the appellant, Mr. Wallace, to recover a balance of commission, alleged to be due to him under an agreement dated the 9th February, 1920, between himself and the respondents, his former employers. Ultimately the question is one of construction, and the words which are chiefly material are these:—

1918-1919 *Accounts.*—You will receive a sum equivalent to 5 per cent. of the nett profits (as shown in the books) of the Bombay Branch of the Bombay Company, Limited, as accruing from the sales of all goods for which you were salesman, whether on purchase or joint account.

In addition to this ... you will be credited with a further sum equivalent to 5 per cent. of the nett profits as shown in the books of the Bombay Branch .. . as having accrued from the sale of all goods sold on joint account and for which you were salesman during the years 1916-1917, 1917-1918, and 1918-1919.

1919-1920 *Accounts.*—As regards other goods sold by you prior to the 7th February, 1920, the results of which have not been included in our closed accounts up to 31st July, 1919, you will be given remuneration on the same basis detailed above. The total sum due to you will be paid as soon as the nett profit is ascertained, and you will be asked to give us a final receipt in full settlement of all claims whatever against us.

The circumstances under which the agreement was entered into are these. After twenty-six years in their service as a salesman, Mr. Wallace desired to end his connection with the respondents, certain fresh terms, which he suggested, not proving acceptable. All that remained was to agree the method and ascertain the figures, according to which his outstanding commissions should be paid to him. Their course of business was this. They purchased piece goods in England at prices reckoned in pounds sterling and sold them through their salesmen to dealers in or near Bombay at prices which were reckoned in pounds sterling also. Long credit was given to these buyers and accordingly the respondents often lay out of

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their money for a considerable time. To pay for the goods in England and for other purposes they remitted funds generally to their English correspondents, who paid the English sellers for the goods, and they made these remittances from time to time as was convenient, by means of sterling drafts on England procured in Bombay at the current rate of exchange. It was not necessary that specific remittances should be made for specific parcels of goods or that the date of the remittance and the due date of the invoices for the goods should coincide, and they found it sufficient to treat payments in their own books as having been made at the average rate of exchange for the customary period within which they fell.

The respondents are also what is called a rupee company. Their financial arrangements are computed in Indian currency, and in particular their profit and loss accounts and balance sheets are made upon a rupee basis. Owing to the length of time intervening between payment for the goods imported and receipt of the sale proceeds from the Indian buyers, they had to show their financial results for office purposes and for presentation to their shareholders during this interval by converting the apparent sterling proceeds into Indian currency at a rate of exchange which was, in the first instance, provisional. An average rate was again made use of, not necessarily over a period corresponding to that used for converting remittances to Europe, nor even always a uniform period. For their own purposes this closed the transactions, and the rupee profit so appearing was treated as realised and final, subject only to reduction in the event of bad debts. These seem to have been of rare occurrence before 1919, but such as there were could be dealt with in the subsequent accounts as occasion might require. So long as the rate of exchange remained fairly stable, questions as to the best method of calculating it did not arise.

It is not contended that the respondents' books have not been carefully and correctly kept or that any change in their system has been adopted for the purpose of the accounts, which they submitted in the action. Down to the date of the dispute Mr. Wallace accepted and still accepts payments, which were made, in fact, according to the method which they still employ. This does not prejudice him, for it may not previously have been worth his while to raise any question, nor was he shown to have actually known how the books were kept, but the fact is worth recording as it removes any appearance of inconsist-

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ency or arbitrariness, which might otherwise arise on the respondents' contentions.

As a purely academic matter the question is one of comparing two figures. Mr. Wallace's commission depends on the Bombay Company's profit. That profit is nett, which, as the parties agree, means that in ascertaining the profit the result of the transaction must be looked to, but that the expenses of the business in connexion with it need not. *Prima facie*, in respect of each sale effected by the salesman, the sum received for the goods sold, less the sum paid for them, is the profit, and these sums have to be compared in the same currency.

Mr. Wallace, however, conceded further that this pure theory must be modified in practice. He himself is paid in rupees, and here, at any rate, exchange enters into the transaction. He accepts the respondents' method of ascertaining the rate of exchange, at which the original cost is converted into rupees, namely, by an average rate, but with the method, by which the company shows its internal financial position, or the figures, on which it invites its shareholders to approve its profit and loss account, he contends that he has nothing to do. He was a servant, not a shareholder. His concern was only with the ultimate realised profit. Again, with the operations of the respondents' exchange department he contends that he has no concern, for exchange should be regarded as a wholly separate business He was only a piece goods salesman, an employee, who earned a commission, not a co-adventurer with the respondents, interested in the outcome of the sales as such. Hence a bad debt affects him only so far as it prevents the ultimate realisation of a profit. No profit, no commission, was his bargain, but he had no agreement as to sharing losses in any form.

The validity of these objections, of course, depends on the extent, to which the theoretic position of a commission salesman is in this case qualified by the agreement sued on, according to its true construction. Two preliminary observations may be permissible; firstly, the object of the agreement is to put an end to existing business disputes by a short and even summary manner of deciding them; secondly, the mode in which this end is to be attained is by making the business books of one party conclusive evidence against the other for certain purposes, instead of being evidence merely against the Bombay Company and then only if the appellant should find it worth his while to put them in.

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The present dispute relates only to the commission due for the period beginning on the 1st August, 1919, which was the commencement of the respondents' financial year, and ending with the *7th February, 1920, the date of the agreement. In 1916 and 1917 exchange was practically steady. It then began to rise, and in two years had risen, from 1*s*. 4 9|32*d*. at the 1st August, 1917, to 1*s*. 8 1|32*d*. at the 1st August 1919. By February and March, 1920, it was as high as 2*s*. 7*d*.; by July it had fallen to 1*s*. 10*d*., and in 1921 it was as low as 1*s*. 3 13|32*d*. Such fluctuations inevitably produced difficult conditions for dealers, both importers and local merchants. One result, which can hardly have been unforeseen by experienced people in the trade in February, 1920, was that local buyers became slower in settling their accounts, and in many instances ultimately defaulted. Another was that, in the meantime, the method of converting sterling into rupee obligations or *vice versa* might prove very important to persons, whose rights and liabilities were still unsettled. How, then, does the agreement of February, 1920, deal with these matters?

As the amount of Mr. Wallace's commission is a matter of percentage, the real point is the profits on which that percentage is to be taken. According to the words of the agreement these profits are: (1) profits of the Bombay Branch, (2) accruing from sales by Mr. Wallace, (3) as shown in the respondents' books, (4) nett. "The books" accordingly become to some extent the arbiters of his rights. What are "the books"? A firm's books come into existence and are kept not for the purposes of a mere statistical record of transactions and payments or of prices and rates. They are essentially a statement in figures of the firm's business as a whole, so shaped as to bring out the precise results of all transactions in rights and obligations and in profits and losses and the principles, on which they set off one set of figures against another and attribute and distribute the results, are as much part of the books as the figures themselves, though no written statement of them is anywhere set out. A plaintiff, who accepts the defendants' books as deciding his rights to some extent, accepts them to that extent (unless he guards himself by apt words) as statements of the right mode of distributing the results of the recorded transactions, and not as a mere repository of figures like a calendar or a price list. The main object of the book-

*The date of the agreement was the 9th (not 7th) February, 1920.— K. J. R.

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keeping was to determine and show the trading position and results of the company, though a minor and incidental object served was to show what it owed Mr. Wallace for commission. That matter always lagged behind the conclusion of his sales, and in 1920 was likely to be more behindhand than ever. Having left the respondents' employment, he might presumably have even less opportunity than before of ascertaining for himself how these transactions were working out, but as these results would be shown in the books, as and when the buyers met their obligations, from these entries his percentage could, and in ordinary course would, be transferred to the credit of his account in the ledger. Their Lordships do not think that on the terms of this agreement the books can be divorced from the system of book-keeping of which they are the expression, or that nothing is intended to be decisive except figures picked out here and there from particular folios. The thing on which the percentage is to be reckoned is the profit of the branch as shown, and in showing a profit the mode of getting at it is as relevant as the final figure. The profit is the profit of the Bombay branch, not of some selected department of that branch, and it is the company's profit. Unless some agreement with their salesman ties the respondents' hands, the calculation of it is in the first instance their affair.

Mr Wallace's ledger account in the books showed nothing with regard to the period in dispute, for it had not been posted up, and it was argued that he could not be bound by what the books showed, where they showed nothing, but in such a case only by a calculation from the figures shown, made in accordance with a method which the Court would fix as correct. Their Lordships cannot adopt this distinction. The circumstance that the appellant's ledger account had not been made up cannot alter the rights of the parties. It might have been due to accident. It was, in fact, due to the disputes which had arisen between the parties and everything was carried to a suspense account only. To lay stress on the word "shown" as meaning "now shown" or "shown, when the respondents' servants have been told to show them," is to defeat the efficacy of the contract. The one reading would deprive Mr. Wallace of commission on any sales, on which at the date of the agreement no profit had yet accrued, for the object of the agreement was to settle all transactions for the period in question and not merely such of them as had then got into the books in a completed form. The other would enable the respondents to bring his

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claim to a standstill by ordering the proper entries to be omitted. Profits "shown" can only mean profits, which from time to time are, or in the ordinary course of business will be, shown. Anything else defeats the contract as an agreement of compromise, and, on the other hand, the agreement refers to profits "shown as accruing" in the books, not to profits which the books do not and never will show as accruing, though by a combination of selected book entries and of argument upon them they may be represented as profits, which ought to have been shown as accruing.

In the view which their Lordships have thus taken of the meaning of the agreement, they can now proceed to deal with the appellant's three objections to the accounts as shown in the respondents' books.

(1) When customers who have "fixed the exchange" with the exchange department subsequently default, the respondents in exercise of their right to reduce apparent profits to nett profits, deduct from the amount credited on sales account the amount of rupees, into which the sterling debt had been subsequently converted when the exchange was "fixed," instead of the corresponding amount of rupees at the date of that credit.

(2) When the customers have met their obligations and have paid for the goods purchased, all that the respondents enter in ascertaining their nett profits is the sterling selling price converted into rupees at the average exchange over a period anterior to the actual date of payment. Thus, when the exchange has been "fixed" after the end of the period over which the rate of exchange was averaged, the respondents have, in fact, received more rupees than the amount of rupees, which they bring in as the basis of their profit, and on which the appellant's commission is reckoned. When this higher number of rupees has been paid, the respondents say nothing about it; when it is a bad debt they bring it in as a deduction in full, and Mr. Wallace is disadvantaged both ways.

(3) In addition to their separate importations of piece goods, the respondents have an arrangement with a Manchester firm, under which they import piece goods on joint account. The Indian customers being known to them but not to the Manchester firm, they have agreed with that firm, in return for a half per cent. commission, to guarantee the payment for the goods. Thus when they render account sales they credit themselves with this commission and with one-half of the pro-

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fit appearing on the sale contracts, and so the matter is closed. All bad debts are thereafter solely their own affair. When they come to reckon their nett profits, they charge the account with all bad debts, but with only half the realised profits plus their *del credere* commission, and account to Mr. Wallace for his commission on the balance. His objection is that as against him only half of the bad debts should be charged. Though he negotiated the sales, he was not informed of the *del credere* arrangement, and, as he does not receive any percentage on the Manchester firm's share of the profits, he should not suffer an abatement of his percentage on the respondents' share in consequence of it.

To this there is an answer, which is separate from the general answer applicable to all three objections. It was the view of both Courts below, with which their Lordships agree, that the half per cent. *del credere* arrangement was a part of the joint account arrangement and ought not to be treated at the will of Mr. Wallace as a separate trading transaction. It was the very natural price asked for the respondents' admission to the joint account business at all. In the result their nett profits on the whole transaction were a moiety of the profit appearing on the selling contracts, plus a half per cent., and minus all bad debts, if any. It is on this basis that they have accounted so far as the joint account business is specially concerned.

The general answer is the same for all three objections. The system adopted by the respondents is the system by which the appellant has agreed to be bound. In the abstract Mr. Wallace's contention is this. He sells in sterling goods bought in sterling, and, subject to realisation, the profit is a sterling profit measured by the difference between the buying cost and the selling price, and the commission is a sterling percentage payable when that profit is realised. Rupee exchange has nothing to do with the transaction. The employers can take payment in any currency and at any rate they like; the only material question is whether the customer has performed his contract: The employers have to pay his commission in sterling, however inconvenient he may find it As for bad debts, so far as he is concerned, they are simply sales negotiated, but resulting in no commission-bearing profit They have, therefore, to be eliminated from the list of his transactions. He has lost his labour, but he has nothing to do with his em-

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ployers' loss of the price of their goods, nor can this be used to diminish profits successfully earned on other transactions, so as to deprive him of his percentage thereupon. In the abstract Mr. Wallace's contention may be right.

The difference between the abstract position and that which, in the concrete, Mr. Wallace accepts for the purpose of this appeal serves to emphasise the fact that his actual employment was necessarily relative to his employers' way of doing business and had to conform to it. If he had insisted on abstract terms, he would probably not have been employed at all. As it is, he admits a conversion into rupees, so as to get payment in rupees; he admits an aggregation of the sale transactions of the year with the consequent averaging of the rate of exchange at which the sterling cost is converted into rupees, and he admits the consequent interpretation of the word "nett" as authorising a deduction of bad debts in their entirety. He argues that the operations of the exchange department concern him, when the buyers perform their bargains, and entitle him to his percentage on the enhanced rupee receipt as "fixed" on a falling rupee exchange, while they do not concern him at all when the buyers' default involves the deduction of bad debts from the profits assumed for the purposes of the company's own finances. All this merely shows how essentially his rights depended, and depend, on express bargain; on his written agreement so long as he was at work; on the agreement sued on when he came to compromise a dispute, which would have involved a challenge of the basis, on which the company regulated the whole of its affairs. The witnesses did not contest that the company's system was reasonable and sound for its own purposes, and an agreement to be bound by the books of the business naturally did not provide a special and different system for the relatively small part of it, which affected Mr. Wallace.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant : *Field, Roscue & Co.*

Solicitors for respondents : *Johnson, Jecks & Colclough.*

K. J R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT :—VISCOUNT DUNEDIN, LORD SHAW, LORD SINHA AND SIR LANCELOT SANDERSON.

Raja Rajeswara Setupati *alias* Muthuramalinga Setupati Avargal, Raja of Ramnad ... *Appellant** (*Plff.*)

v.

Muthanan Servai *alias* Tirunilakantan Servai ... *Respondent* (*Deft.*).

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Raja of Ramnad v. Muthanan Servai.

Lease of melvaram rights—Liability for village officer's remuneration— Maniba swatantrams.

The Raja of Ramnad, as Zemindar, executed a *cowlenama* (lease) of certain villages in defendant's favour. The lease was, in effect, of the right to collect melvaram from the tenants of the villages. The Raja was under an obligation, and directly liable, to pay out of the gross yield nine per cent. to the village officers as their remuneration (*maniba swatantrams*). The defendant-lessee made these payments direct to the village officers. The Government having afterwards fixed salaries in cash for the village officers, the nine per cent. became no longer payable to them by the Raja. The Raja accordingly claimed to recover from the defendant-lessee the nine per cent. of the gross produce, contending that the defendant had hitherto been paying the same over to the village officers as an agent of the Raja and that when the obligation of the Raja to make these payments ceased, the defendant-lessee was thereafter receiving the nine per cent. for the Raja's use. The High Court, by a majority, disallowed the Raja's claim, holding that "the case was analogous to cases quoted where, a conveyance having been made of lands under certain burdens, if from any extraneous cause the burdens disappear, the benefit accrues to the grantee of the lands and not to the grantor."

Held, by the Judicial Committee (reversing the High Court) that the Raja was entitled to recover the nine per cent. of the gross grain produce which represented the *maniba swatantrams* payable to the village officers from the date when the *swatantrams* no longer became payable to them by the Raja.

Judgment of the High Court reversed.

Consolidated Appeals (No. 31 of 1926) by special leave from a judgment and two decrees of the High Court, Madras, dated the 6th January, 1922.

The appellant is the Raja of Ramnad and the respondent is a lessee of two villages on the appellant's estate under two leases of 1894 each for a term of years. According to the custom and practice on the estate the Raja received 48 per cent. of the gross produce in kind from each ryot or actual cultiva-

*P. C. Appeal No. 31 of 1926. 28th June, 1927.

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tor, the latter retaining the other 52 per cent. Out of the 48 per cent. so received by the Raja, one-fourth or 12 per cent. of the gross produce was received by the Raja for certain purposes, namely 3 per cent. for *mahamais* or charity and 9 per cent. for *maniba swatantrams* or payments in kind to the village officers, the balance 36 per cent. being for the Raja's sole beneficial enjoyment as landlord. The dispute in the present appeals relates only to the appellant's claim in respect of the *maniba swatantrams*. The respondent after obtaining the leases collected the 48 per cent. of the gross produce from the ryots, paid the 3 per cent. set apart for charity purposes to the Raja, disbursed the 9 per cent. to the village officers whom the Raja was liable to pay, and enjoyed the remaining 36 per cent as the assignee of the Raja's share in the produce. In 1911 the Government of Madras fixed the salaries of the village officers in cash and relieved the Raja of his liability to pay them in kind and in lieu of it added a certain amount to the peshkash of his estate which additional amount provided the village service fund from which the village officers were thenceforth paid. The amount due by the respondent for faslis 1321 to 1324 under the leases of 1894 fell in arrears and the appellant instituted against the respondent two suits in the Court of the Subordinate Judge of Ramnad. The respondent raised various defences to the suits and pleaded in respect of the *maniba swatantrams* that they passed to him for the period of the leases as the assignee of the Raja's melvaram and that the Raja was not entitled to them. The Subordinate Judge on the 29th January, 1919 passed decrees in the suits in favour of the appellant. The defendant appealed to the High Court and confined himself in the appeals to the plaintiff's claim in respect of *maniba swatantrams*. The appeals were heard by Sir John Wallis, Chief Justice and Mr. Justice Sadasiva Aiyar, who differed on the question of the defendant's liability. The learned Chief Justice was of opinion that the plaintiff was not entitled to the *maniba swatantrams* and that his remedy was to have the rent enhanced under the provisions of Madras Act II of 1894. Sadasiva Aiyar, J., agreed with the Subordinate Judge and held that the plaintiff's claim was rightly decreed. As a result the defendant's appeals were dismissed. He preferred further appeals under clause 15 of the Letters Patent against the judgment of Sadasiva Aiyar, J. The appeals were heard by Sir Walter Schwabe, Chief Justice and Justices Coutts-Trotter and Kumaraswami Sastri. The Chief Justice and

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Mr. Justice Coutts-Trotter held that the plaintiff's remedy was under Madras Act II of 1894 and that he was not entitled to a decree for *maniba swatantrams* in these proceedings. Kumaraswami Sastri, J., differed from them and held that the plaintiff was entitled to the decrees which he had obtained. The defendant's appeals were allowed in accordance with the opinion of the majority of the Judges on the 6th January, 1922, (*see* 43 M. L. J. 158). The plaintiff moved the High Court, Madras, for leave to appeal to His Majesty in Council against the judgment of the High Court dated the 6th January, 1922 in the Letters Patent Appeals, but the learned Judges (Schwabe, C. J., Coutts-Trotter and Sastri, JJ.) refused to the plaintiff leave so to appeal. The plaintiff thereupon applied to His Majesty in Council for special leave to appeal, and leave was duly granted.

The material facts are set out in their Lordships' judgment, and also in the report of the case in the Court below (*see* 43 M. L. J. 158).

De Gruyther, K. C. and *Narasimham* for appellant.

Dunne, K. C. and *Subba Row* for respondent.

28th June, 1927. The Judgment of their Lordships was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN.—These are two suits which were brought by the Raja of Ramnad, as plaintiff against the *cowledar,* who held a lease of certain villages, as defendant. The two suits relate to two different villages. The date of the leases is 1894, and, there being no practical difference between them, it will be sufficient to quote one lease.

The lease, which is termed a *cowlenama,* was executed on the 10th December, 1894, and was in these terms:—

"Whereas *cowle* has been given to you for 30 faslis from fasli 1303 last with a poruppu of Rs. 420-10-10 per fasli according to peshkash rate, in respect of Vahaikudi village situate within the four boundaries mentioned below and attached to Kottakudi division, Rajasingamangalam taluk, which is of the extent of nanja seed land kalams 187-3-0 and punja kurukkams 3-0-0 whose average per fasli for the aggregate 10 faslis from fasli 1289 to fasli 1298 works at Rs. 972-3-2, you shall enjoy the same together with *meradai, maravadai, thittuthidal,* etc.; in the said village and duly pay the said poruppu amount of Rs. 420-10-10 each fasli commencing from fasli 1303 last according to kistbund instalments whether you make cultivation or let the lands or run waste and whether there be or be not any yield. In default, you shall make payment with interest at 1 per cent. per mensem from the date of default. You shall conduct repairs to the tanks, etc., in the said village. You shall be rendering accounts showing particulars of collections in respect of cultivation made in the village every fasli Along with the said poruppu

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amount you shall pay the amounts for road cess, jari mahamai, dharma mahamai, etc., to be fixed bearing on the aforesaid accounts. In default of payment of the said poruppu amount, etc., you shall be liable to the following, viz., your being proceeded against under Act VIII of 1865, the said village being liable to the said amount falling due, your having no concern in the avarampattai, etc., lease and proceedings being taken according to law in case of default in any part hereof. Yourself and your heirs are bound to cause to be rendered every year the services to the Devasthanam temples and the palace which have to be rendered during the *Navaratri* and *Sankaranthi* and for dragging the car, as also to pay uluppai, etc., and you shall deliver possession of the village to the estate in the beginning of fasli 1333 when the *cowle* expires. To this effect is the *cowlenama* executed. An income of about Rs. 100 is derivable from the said village in respect of Dharma mahamai, Jari Mahamai, road cess, etc."

Then the particulars and the boundaries are set out.

In order to consider the import of this lease, it is necessary first to consider what was the state of affairs at 1894. It has been proved that the state of affairs was this. The grain on the estates was all brought to the granary. It was then divided. The cultivating tenants got 52 per cent. of the grain. That left 48 per cent. undisposed of. Of this, 9 per cent. was appropriated to pay the village officers and 3 per cent. was appropriated for various charities. This left 36 per cent., which the Raja kept for his own use. In 1911, the Government relieved the zemindars from the charge of paying the village officers. The defendants in these two cases fell into arrears and plaints were then started which asked for decrees for (1) the rent; (2) the amount payable for the charities; and (3) the amount which, prior to 1911, had been handed over to the village officers. A decree was granted for (1) and (2), and there is no question now raised as to that. As to (3), that is to say the amount which was handed over to the village officers, it is admitted that the defendants *de facto* took the grain, but they pleaded that it was their own under the terms of the lease. The Subordinate Judge gave judgment in favour of the plaintiff for all three sums. On appeal the two Judges differed and therefore the judgment stood. Second appeals were taken under Letters Patent. Two of the three Judges before whom the appeals were heard held that the grain belonged to the defendant under his lease, and they therefore confirmed the decrees of the Subordinate Judge as to (1) and (2), but allowed the appeal as to (3).

Appeal from that judgment is taken to His Majesty in Council. The sole question therefore is: Was there a right

to the 9 per cent. of the grain given to the defendant under the lease. After the relief of the zemindar by the Act of 1894, the Government raised the peshkash payable by the zemindar, by the following notice:

"As the villages in the Ramnad zamindari are being grouped and fixed monthly salaries paid to the holders of the three village officers, headman, karnam and talaiyari or kavalgar under S. 6 of Act II of 1894, and as these village officers are not in future entitled to *swatantrams* or *Ivu manyams* which they have been hitherto getting and which were deducted from the total beriz of the zamindari when the peshkash was fixed, the Government of Madras have resolved to raise the peshkash of the Ramnad zamin by Rs. 13,105 under section 27 (2) of Madras Act II of 1894. You are therefore required to show cause in person or in writing on or before the 19th March next why the said sum divided rateably between the various portions of the zamindari should not be adopted and the same collected from you in addition to the present peshkash you pay."

This was obviously only done on the assumption that the zemindar was the person who benefited by the relief afforded.

Now the lease is silent as to the 9 per cent. due to the village officers. The learned Judges who decided in favour of the defendant came to the conclusion that as the lease bore to be of the village, it must be inferred that the 9 per cent. was transferred to the respondent, imposing on him an obligation to pay the village officers. They therefore thought that the case was analogous to cases quoted where, a conveyance having been made of lands under certain burdens, if from any extraneous cause the burdens disappear, the benefit accrues to the grantee of the lands and not to the grantor.

Their Lordships do not read the lease in this sense. No mention being made expressly of the payments to the officers, the transaction must be looked at as a whole to see what was meant to be done. Now, first it is certain that the officers, if they were not paid had a claim against the zemindar and against him alone. They could not have sued the *cowledar* because there was neither privity of contract nor relation of tenure on which such a suit could have been based. It is therefore antecedently improbable that the zemindar would part with a specific fund which he had to pay to the officers to a third party, taking as his security the personal obligation of the third party to pay the officers. Further, it is admitted that the calculation of the average takings from the tenants put at Rs. 972 odd in the one lease, and Rs. 982 in the other, was calculated on the 36 per cent. only of the total receipts of grain; and as the tenant was getting the lease for Rs. 420 odd, and also getting

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waste lands which were unlet to tenants, and had only to pay about Rs. 100 in the one case, and Rs. 120 in the other, for cesses, etc., he was getting a very ample margin of profit

Then as to the clause with regard to the payment of the charity dues, which are admitted to be 3 per cent., this, it will be noticed, is not put as part of the rent, but as a separate payment. It was natural that the zemindar should wish the charity fund handed over to him, because he was the dispenser of the charities, a function for which the *cowledar* would have been totally unfitted. The fact that special words as to the payment of this are put in makes it all the more significant that the question of the 9 per cent. was left undealt with.

Their Lordships therefore come to the conclusion that the 9 per cent. was not conveyed to the *cowledar*, that the *de facto* handing over of the grain by him was really done *ad hoc* as an agent for the zemindar, and therefore the claim of the *cowledar* to have a proprietary right in the 9 per cent. under a personal obligation to pay the village officers is quite unfounded in the circumstances.

In this view it becomes quite unnecessary to discuss whether, if the view had been opposite, the zemindar would have been entitled to a sort of conditional equitable compensation by getting his rent increased under the provisions of the Madras Act II of 1894.

Their Lordships will therefore humbly advise His Majesty to allow the appeals in both actions and to restore the judgment of the Subordinate Judge with the costs in the Courts in India. Under the Order in Council granting the appellant special leave to appeal, he will pay the respondent's costs of the appeals to His Majesty in Council as between solicitor and client.

Solicitors for appellant : *Chapman-Walker & Shephard.*

Solicitor for respondent : *H. S. L. Polak.*

K. J. R. *Appeals allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT :—VISCOUNT DUNEDIN, LORD SHAW, LORD SINHA AND SIR JOHN WALLIS.

Alwar Naidu and another ... *Appellants** (*Plaintiffs*)

v.

Kothandapani Naidu and others ... *Respondents* (*Defendants*)

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Alwar Naidu *v.* Kothandapani Naidu.

Discharge of mortgage—Presumption arising from mortgagor's possession of the mortgage bond, when rebutted

In a suit to enforce a mortgage, the defendant's case was that the mortgage debt had been discharged and that the mortgage deed had been returned to him. The plaintiff denied these allegations and pleaded that the deed had been stolen from him. It was found that at the time of executing the mortgage the defendant had deposited with the plaintiff the title deeds of the mortgaged property, and that they were still in the possession of the plaintiff.

Held, that the fact that the defendant did not get back the title deeds at the time of the alleged discharge considerably weakened the presumption in his (defendant's) favour arising from the possession by him of the mor'gage deed.

Appeal (No. 66 of 1925) from a judgment and decree of the High Court, Madras (Phillips and Devadoss, JJ.), dated the 26th February, 1923, reversing a judgment of the Additional Subordinate Judge of Trichinopoly, dated the 31st January, 1921.

The material facts are set out in their Lordships' judgment.

K. V. L. Narasimham for appellants.

The respondents were not represented at the hearing.

19th July, 1927. The Judgment of their Lordships was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—In this case either the plaintiffs are suing to recover a mortgage debt already discharged, or the defendants are setting up a false case of discharge, relying on the fact that the mortgage deed has come into their possession and purports to bear an endorsement of discharge by the plaintiffs' father, who had admittedly lent money to the first defendant and taken a mortgage bond in the name of his son, the second plaintiff. The Subordinate Judge of Trichinopoly found on a full consideration of the evidence that the plaintiffs'

*P. C. Appeal No. 66 of 1925. 19th July, 1927.

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case was true and the defence totally false, while the learned Judges of the High Court held that the possession of the document bearing an endorsement of discharge threw heavily on the plaintiffs the onus of proving that the document was stolen from them and the endorsement forged, and that they had failed to discharge it. The respondents were not represented at the hearing of this appeal, and their Lordships unfortunately have not had the advantage of hearing counsel on their behalf They have, however, very carefully considered the evidence, and have come to the conclusion that the Subordinate Judge was right in finding in favour of the plaintiffs.

On the 1st August, 1916, the first defendant (who was the father of the second and third defendants), for the consideration recited in the deed executed a mortgage bond in favour of the second plaintiff, making the mortgage debt repayable on or before the 31st August, 1918. At the same time he deposited with the plaintiffs the title deeds of the mortgaged property, which are still in possession of the plaintiffs, and the fact that he did not get them back at the time of the alleged discharge when, his case is, the document itself was returned to him, in their Lordships' opinion considerably weakens the presumption in his favour arising from the possession of the mortgage document. The first defendant, no doubt, endeavoured to explain this on the ground that the plaintiffs' father insisted on retaining them until payment of a promissory note for Rs. 500, by which according to the endorsement alleged to be forged, the balance of the mortgage debt was discharged. He also endeavoured unsuccessfully to show that some of the deeds had been returned to him. Apart, however, from the question of onus, their Lordships are satisfied that the defendants' story of discharge is false. In coming to this conclusion they have necessarily disregarded the finding of the learned Subordinate Judge, based on comparisons of handwriting, that the Tamil endorsement of discharge on the mortgage deed was not in the handwriting of the plaintiffs' father, inasmuch as the learned Judges of the High Court do not accept this conclusion, and the question is one as to which necessarily their Lordships are not in a position to form any opinion of their own.

The mortgage deed (Ex. 1) contains two admittedly genuine endorsements of payment of interest 1 (*b*) and 1 (*c*) of the 6th and 7th September, 1916 which are not in the first defendant's handwriting, but signed by him according to the usual

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practice, thus affording a fresh starting point for limitation. These endorsements are said to be in the writing of the second plaintiff. On the other hand, the next six endorsements of payments of principal and interest, on which the first defendant relies, are all in his own writing, as well as signed by him, and could therefore have been made by him at any time after obtaining possession surreptitiously of the deed.

The plaintiffs' father, who is alleged to have made the endorsement of discharge on the deed on the 10th May, 1917, died on the 21st June, 1917, and the plaintiffs' case is that they first missed the mortgage deed in the following September. There is the evidence of their relation, Mr. Sadagopa Naidu, then a Subordinate Judge, who was examined on commission but was not cross-examined, owing to the defendants not having taken the necessary steps, that the plaintiffs informed him of the loss and asked his advice; and Ex. G series shows that, in pursuance, they say, with his advice, at the end of October, 1917, they endeavoured to publish a notice of the loss in the "Trichinopoly District Gazette," but that their application was returned as not in accordance with the rules.

We have next certain notices of the 29th November and 28th December, 1917, and the 3rd March, 1918, which are alleged to have been sent by the first plaintiff to the first defendant, warning him not to make any payment of principal or interest except upon the joint receipt of himself and his younger brother, the second plaintiff. These notices, it is said, were sent by registered post; and the two first were returned as the addressee could not be found, while there is a postal acknowledgment by the first defendant of a letter from the first plaintiff, said to relate to the third notice. The learned Judges have criticised the plaintiffs' evidence as to the sending of these notices, but as they do not mention the loss of the deed—according to the first plaintiff's evidence the omission was deliberate—they really throw very little light on the case.

The mortgage debt, as already stated, was repayable by the 30th August, 1918, and it was not until a year later, on the 25th August, 1919, that the plaintiffs instituted the present suit. As observed by the Subordinate Judge, it cannot be said that there was anything unusual in such delay. On the other hand it is certainly unusual to find a mortgagee paying off a mortgage little more than nine months after the execution of the deed,

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and more than fifteen months before the date fixed for repayment. The plaintiffs' explanation is that, as the fictitious payment was alleged to have been made to their father, it was necessary to fix on some date before his death on 21st June, 1917. To meet this case the plaintiffs endeavoured to prove that before the 21st May the first defendant had been disabled by paralysis and was not in a position to make the endorsement. The learned Judges have not accepted this evidence in view of his having subsequently made a fatiguing pilgrimage, but the point is immaterial because, in their Lordships' opinion, the first defendant's conduct and evidence shows that his story is false.

Under the Code the plaintiffs were required to file the mortgage sued on with the plaint, and, as they were unable to do so, they filed a copy of the mortgage from the Registrar's Office, stating that they did so because the original was lost.

In his written statement of the 4th November, 1919, the first defendant pleaded in paragraph 5, "There having arisen a necessity for this defendant to discharge the suit bond and redeem the suit properties mentioned therein even some time prior to the due period fixed in the suit bond . . . . . this defendant collected the amount in several ways, paid it to the plaintiffs' father, completely discharged the suit bond, and got the suit bond with the said person's indorsement; further, the said bond was given in support of an agreement which this defendant had to execute in favour of another party even at that time. I am ready to produce it through summons at the time of hearing." On the same day he put in a supplemental statement: "The discharged suit bond is with Pulivalam Sundaram Pillai. I have executed an agreement in his favour on a stamp paper. I have given that bond as a title deed. That Sundaram Pillai is at Pulivalam. I do not know his father's name."

It appears from an affidavit (Ex. J) filed by the first plaintiff on the 29th January, 1920, that P. Sundaram Pillai was summoned to produce the document in Court on the 2nd December, 1919, and that he did not come himself, but sent the document by one Gopalaswami Nayudu, by whom it was lodged in Court. According to the plaintiffs the production by the first defendant of the mortgage deed and the reliance placed upon it made it apparent how the deed had disappeared. Their elder brother Namberumal was admittedly on bad terms with his

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father, and had been expelled from the family house and disinherited by his father because he was guilty, or suspected to be guilty, of an intrigue with his step-mother, the father's second wife. His own wife remained in the house under his father's protection, and after the father's death he was frequently at the house, and it is suggested by the plaintiffs that the abstraction of the document and its delivery to the first defendant were due to the enmity of the elder brother. Having regard to the extremely unsatisfactory nature of the evidence for the defence, this appears to be not unlikely.

In the first defendant's evidence we find nothing about the necessity of discharging the bond before it was due, which was mentioned in his written statement. He merely says he paid it more than fifteen months before it was due because his creditor asked him to do so, which is very unconvincing. In cross-examination he says he had not filed his accounts, and that the payments in discharge of the mortgage were not entered in them. He had, however, received receipts for these payments, which were not produced. He says he borrowed the Rs. 2,000 from Sundaram Pillai on the security of the returned mortgage deed (Ex. 1), and executed a promissory note and an agreement relating to his house, which was item 1 in the mortgage deed (Ex. 1). If this was true, Sundaram Pillai should not only have been able to speak to the advance of Rs. 2,000 which was paid in discharge of the suit mortgage, but also to the fact of the mortgage deed having been handed over by the plaintiffs' father before he died to the first defendant. However, he was not called, or apparently even summoned, and the first defendant only called three witnesses besides himself. One of these, who spoke to a part payment of Rs. 1,000 in his presence, and to the handwriting of plaintiffs' father, appears to have been opposed to the plaintiffs in litigation, and his evidence is not entitled to any weight. In default of Sundaram the first defendant only called Abdul Rahiman, a cartman, who would appear to have been in his service, to speak to the alleged discharge. The only remaining witness was called to rebut the plaintiffs' case that the plaintiffs' father was suffering from paralysis and unable to transact business at the date of his death. Whether he was or not in their Lordships' opinion, is immaterial. They agree with the finding of the learned Subordinate Judge that the case of discharge set up by the defendants is false, and they will accordingly humbly

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advise His Majesty that this appeal be allowed and the suit decreed with costs in the Courts below and before this Board.

Solicitor for appellant : *H. S. L. Polak.*

K. J. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT :—LORD BLANESBURGH, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Suraj Bhan Singh and others ... *Appellants** (*Plffs.*)

v.

Sah Chain Sukh and others ... *Respondents* (*Defts.*).

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Suraj Bhan Singh v. Sah Chain Sukh.

Hindu Law—Alienation by widow—Necessity for small part of consideration not established.

Where a sale by a Hindu widow for Rs. 19,000 was proved to be for legal necessity to the extent of Rs. 17,378, the Judicial Committee, applying the principles laid down in *Krishn Das* v. *Nathu Ram,* (1926) I. R. 54 I A 79 : 52 M L J 720 (P C) and *Niamat Rai* v. *Din Dayal,* (1927) I. R 54 I A 211 : 52 M L J 729 (P C) held that the sale could not be challenged.

Appeal (No. 20 of 1926) from a judgment and decree of the High Court, Allahabad (Lindsay and Sulaiman, JJ.), dated the 30th January, 1924, reversing a judgment of the Subordinate Judge of Mainpuri, dated the 24th February, 1921.

The plaintiff brought a suit to set aside a sale made by a Hindu widow, Phula Kunwar, to the defendant, alleging that the sale was without any legal necessity. Various questions were raised in the Courts below, but it is unnecessary to refer to them for purposes of this report. The Subordinate Judge found that out of the consideration of Rs. 19,000, the sale of the property by Phula Kunwar was justified to the extent of Rs. 17,378, and he passed a decree in plaintiff's favour to the following effect:—"It is ordered and decreed that the plaintiff's claim for possession of the property in dispute be decreed on payment of Rs. 17,378 by the 23rd May, 1921. The rest of the claim be dismissed." On appeal to the High Court, the plaintiff's suit was dismissed *in toto* on other grounds, but the learned Judges agreed with the Subordinate Judge in holding that Phula Kunwar's sale was good to the extent of Rs. 17,378 only. The plaintiff having appealed to His Majesty in Council against the judgment of the High Court, their Lordships, without going into the other questions raised by the appeal, dismissed it on the short ground that the case was governed by

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*P C Appeal No. 20 of 1926. 12th July, 1927.

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the principles laid down by the Board in the recent cases of *Krishn Das* v. *Nathu Ram* (1) and *Niamat Rai* v. *Din Dayal* (2).

Dunne, K. C. and *Dube* for appellants.

Lowndes, K. C. and *Wallach* for respondents.

12th July, 1927. The Judgment of their Lordships was delivered by

Lord Blanesburgh.

LORD BLANESBURGH :—It appearing to the Board that this case comes within the principles laid down by the Board in the cases of *Krishn Das* v. *Nathu Ram* (1) and *Niamat Rai* v. *Din Dayal*(2), their Lordships, without taking into consideration the facts of the case, will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitor for appellants : *H. S. L. Polak.*

Solicitors for respondents : *Douglas, Grant & Dold.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT :—LORD BLANESBURGH, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Lala Jagmohan Saran ... *Appellant** (*Plaintiff*)

v.

Sahu Deoki Nandan *alias* Jwala Prasad and others ... *Respondents* (*Defendants*).

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Lala Jagmohan Saran v. Sahu Deoki Nandan.

Indian Limitation Act, 1908, *Art.* 118—*Suit to declare invalidity of adoption—Knowledge of alleged adoption for over* 6 *years.*

Article 118 of the Indian Limitation Act, 1908, governs a suit which is in effect and substance one for a declaration that a particular adoption is invalid.

Where the plaintiff had knowledge for more than six years prior to the institution of the suit that a claim on the strength of the alleged adoption was being made, the suit would be barred by Article 118, Limitation Act.

Appeal (No. 24 of 1926) by special leave from a judgment and decree of the High Court, Allahabad (Sir Grimwood Mears, Chief Justice and Sir Promada Charan Banerji), dated the 3rd May, 1922, reversing a judgment of the Subordinate Judge of Moradabad, dated the 7th May 1919.

The plaintiff Jagmohan Saran brought this suit on the 13th June, 1918 for a declaration that an adoption of the

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* P C Appeal No. 24 of 1926. 12th July, 1927.

1. (1926) L R 54 I A 79 : 52 M L J 720 (P C).
2. (1927) L R 54 I A 211 : 52 M L J 729 (P C).

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defendant Deoki Nandan by one Govind Prasad alleged to have taken place on the 21st August, 1898 had not in fact taken place. The plaintiff was 27 years old at the time of the institution of the suit. The suit was decreed by the Subordinate Judge. On appeal to the High Court, the suit was dismissed, the learned Judges holding, on the merits, that there was a valid adoption of the defendant. On the question of limitation, they made the following observations:—"There remains the question whether the claim of the plaintiff is barred by limitation. Holding the view that we do that there was a valid adoption of Deoki Nandan by Govind Prasad......., it is unnecessary for us to decide the question of limitation. If, however, we were to pronounce an opinion upon the point, we think that the claim in the suit must be treated as a claim for a declaration that Deoki Nandan was not in fact adopted and that his adoption was invalid. If this is so, Art. 118 of the Limitation Act bars the claim. We are also of opinion that Art. 125 (of the Limitation Act) is not applicable to a suit of this description".

The plaintiff appealed to His Majesty in Council from the judgment of the High Court.

Dunne, K. C. and *Dube* for appellant.

Lowndes, K. C. and *Wallach* for respondents.

12th July, 1927. The Judgment of their Lordships was delivered by

Lord Blanesburgh.

Lord Blanesburgh.—As a result of the opening of this appeal by Mr. Dunne, it is possible for their Lordships to dispose of the case on a very short ground It has been made clear that this action is in truth and substance a suit for a declaration that a particular adoption was invalid. It is plain that the fact that a claim was being made on the basis of this alleged adoption was known to the plaintiff in the suit more than six years before it was instituted, and that he himself had attained majority nearly nine years before the suit was commenced. The suit being in substance one for a declaration to the effect just stated, their Lordships, on these uncontested facts, are of opinion that it is barred by Art. 118 of the Limitation Act. In these circumstances no useful purpose would be served by any further examination here and now of the matters in controversy, and for the reason that the suit is out of time their Lordships will humbly advise His Majesty that

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this appeal by the plaintiff should be dismissed. The appellant must pay the costs.

Solicitors for appellant : *Barrow, Rogers & Nevill.*

Solicitors for respondents : *T. L. Wilson & Co.*

K. J. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

U. Panduranga Bhatta ... *Appellant* in both (5th deft.)*

v.

M. Krishna Nayak & Sons by partner M. Annappa Nayak and others ... *Respondents (Plaintiff and* 1, 3, 5 *and L. R.'s of the 5th Defendant*).

Panduranga Bhatta v. Krishna Nayak & Sons.

Partnership—New partnership—Debts of old partnership taken over by—Renewals of—Binding character of, on new partnership—Conditions.

It is no doubt the law that, if a newly constituted partnership agrees among its members that the members of the new partnership shall have the power to bind it for the debts of the previous firm which the new partnership had taken over, that would be binding on the new partnership. That rule is, however, inapplicable to a case in which there is nothing in the transaction to show that the persons who entered into it were purporting to act on behalf of the new partnership.

Appeals against the decrees of the Court of the Subordinate Judge of South Kanara in Original Suit Nos. 50 and 47 of 1923.

V. Radhakrishnayya and *K. Sanjeeva Kamath* for appellant.

K. S. Krishnaswami Aiyangar, S. T. Srinivasagopalachari and *K. B. Sarvothama Rao* for respondents.

C. V. Ananthakrishna Aiyar for Official Assignee.

B. Sitarama Rao for 5th respondent.

The Court delivered the following

JUDGMENT :—*Appeal No.* 211 *of* 1924.—I have come to the conclusion not without considerable reluctance that this appeal must be allowed. The case was brought on two promissory notes, one dated the 10th April and the other the 25th April, 1923 and there is no doubt that some of the defendants were previously engaged in the conduct of a motor bus concern known as the Kanara Transport Company. It seems to me clear that efforts were made

*Appeals Nos. 211 of 1924 and 283 of 1925. 26th January, 1927.

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which eventually succeeded to get the appellant Panduranga Bhatta into this business to set it on its feet because it was in or about the beginning of 1923 in a very bad way and owed money to several creditors of whom the plaintiff was one. The learned Judge relied upon a document, Ex. IV as proving not merely that the appellant Panduranga Bhatta was a partner as and from its date as he had been before and that was to cover the promissory note of the 10th April. In my opinion the document when looked at clearly indicates that it was meant to speak as from the date that it came to birth and that it purported to constitute the partnership as from 17th April, 1923. Therefore *prima facie* there would be no liability on the appellant in respect of the promissory note of the 10th April so long as his liability is put on the footing of his being a partner *de facto*. The case, however, is put in two other ways. It is said that although he was not a partner and I am speaking entirely of the earlier of the promissory notes—that, assuming he was not a partner on the date when that promissory note was executed, he may nevertheless be liable upon it for one of two reasons. The first is that he was sought to be made a partner by holding out, that is to say, by estoppel. The answer to that appears to me to be twofold. The first is that no such case was pleaded or sought to be made in the Court below: indeed the only two documents which, it is suggested, could support an estoppel are two promissory notes which were neither exhibited in the Court below nor of course consequently have been printed here and it seems astonishing that the plaintiff should seek to build up a case, the only documents in support of which he has not even taken the trouble to produce. Therefore I think that the case of estoppel goes because the only other evidence of it is the reference by the plaintiff's 1st witness in his evidence to vague statements made by the defendants to him in September, 1922 that they were all partners.

"They (the defendants) themselves told me so (namely, that they were all partners) in September, 1922 in connection with their desire to open credit with me."

That is a conversation which is not fixed on to the appellant (5th defendant) and one knows how dangerous it is to attach legal liability on the faith of a conversation between four or five people when all that the person who was present at the conversation says is "they say" and he was never asked in examination-in-chief to develop this or to say exactly what were the words used by the 5th defendant as distinct from the

others. In my opinion therefore it would be quite impossible to place any reliance on that one statement of the plaintiff's 1st witness in order to found a liability in estoppel.

With regard to the second promissory note, that is dated the 25th April, 1923. No doubt on the face of it that would look like a document which, as it came into birth after Ex. IV, would be one which very likely would bind the new partnership and therefore the 5th defendant. But unfortunately the suit here can only be on the consideration because the 5th defendant did not sign the promissory note and the evidence is that this note was a renewal of an earlier note which admittedly came into existence and created the debt long before there was any question of the 5th defendant being a partner at all. Now it is said that it is the law that, if a newly constituted partnership agrees among its members that the members of the new partnership shall have the power to bind it for taking on the debts of the previous firm which the new partnership had taken over, that would be binding on the new partnership. The answer is:

"Certainly provided there is anything in the transaction to show that the persons who executed the bills or notes or whatever are relied upon were purporting to act on behalf of the new partnership."

Of that here there is not a trace. The promissory note was signed by the signatories without a hint that they acted in any representative capacity; nor did they append the description either in the body or after the signature in the note that they signed on behalf of the Kanara Transport Company. In these circumstances it appears to me that the plaintiff failed to make out his case and that the appeal must be allowed with costs. I think the conduct of the 5th defendant is very suspicious but after all we cannot found a judgment or even deprive a man of costs merely because we think that he gave rise to ideas in various people's minds by entering into transactions that he was likely to be concerned in. It cuts both ways and it rather militates against the view that he was a near relation of the 1st defendant who was unquestionably liable for all these debts because one knows it is very common in this country—it is not so in England—for people to sign notes on behalf of relations in matters in which they have no concern whatever other than the accommodation of the persons concerned. The costs throughout will be paid by the plaintiff (1st respondent).

Pandurangs Bhatta v. Krishna Nayak & Sons.

Appeal No. 283 *of* 1925.—This appeal is allowed and the plaintiff (1st respondent) will pay the appellant the out-of-pocket expenses.

A. S. V. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER AND MR. JUSTICE MADHAVAN NAIR.

Chinnathorai Pillai ... *Appellant** (*Respondent in S. A. No.* 831 *of* 1924 *on the file of the High Court Deft.*)

v.

Rao Bahadur M. R. Govinda Rao (since removed from Trusteeship) and another ... *Respondents and party respondent* (*Appellant in do. Plaintiff and party respondent in the High Court*).

Chinna-thorai Pillai v. Govinda Rao.

Madras Estates Land Act, S. 26, *cl.* 1—"*Waste land*"—*Meaning of —Land lying fallow for a few years—"Bringing into cultivation"—Meaning of.*

To attract the provisions of S. 26, cl. 1 of the Madras Estates Land Act, it must be shown that the land at the time of the lease was (1) waste land, and (2) that the lease was given for clearing it and bringing it into cultivation. The question whether a piece of land is "waste land" or not must depend upon the circumstances of each case and the evidence given in it. In order to be described as "waste land", the land need not necessarily be immemorial waste land; but if it has really never been cultivated or at any rate has not been cultivated for a long time, it will come within the meaning of the term "waste land" used in the section. The mere fact that land lies fallow for one, two or even four years cannot constitute "waste land" within the meaning of the section.

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Phillips dated the 12th August, 1925 and passed in S. A. No. 831 of 1924 preferred to the High Court against the decree of the District Court of Ramnad at Madura in A. S. No. 853 of 1921 preferred against the decree of the Court of the Special Deputy Collector of Manamadura in S. A. No. 185 of 1918.

K. Rajah Aiyar for appellant.

T. L. Venkatarama Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff-respondent is the manager of the Piranmalai Devasthanam. He instituted a suit to recover

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*L. P. A. No. 293 of 1925. 4th March, 1927.

Chinnathoral Pillai v. Govinda Rao.

rent in respect of certain lands belonging to the Devasthanam which were granted on a permanent lease at a favourable rent by one of his predecessors. Exhibit II, dated the 21st of January, 1900, is the perpetual *cowle*. The suit was resisted by the defendant-appellant on the ground that it was barred by limitation under Art. 134 of the Limitation Act, and that the lease was justifiable under S. 26 of the Estates Land Act because it was granted for the purpose of bringing waste land into cultivation. Following *Vidya Varuthi* v. *Balusami Aiyar* (1) and other decisions of this Court the learned Judge (Phillips, J.) held that Art. 134 did not apply to this case and as according to these rulings the period of limitation began to run only from the date of the ascension of the plaintiff trustee to his office, he held that the suit is in time. He also held that the appellant is not entitled to rely on S. 26 of the Estates Land Act, as in his view it did not appear that the land in question was granted for the purpose of

"clearing and bringing waste land of the estate into cultivation "

In this Letters Patent Appeal preferred against the learned Judge's judgment his decision on the question of limitation, in view of the rulings of this Court and of the Privy Council [see also *Rama Reddy* v. *Rangadasan* (2)] has not been questioned. The argument that has been pressed before us is that the learned Judge's view that S. 26 of the Estates Land Act does not apply to this case is wrong. On this point the observations of the learned Judge are as follows:—

"Although the lease recites that this land was overgrown, that the irrigation source was out of repair and that the land was uneven, it does not appear that the land was waste land within the meaning of S. 26. I agree with the District Judge that "bringing into cultivation" means cultivating land which had not previously been cultivated or at any rate had not been cultivated for a long period. The mere fact that land lies fallow for one, two or even four years cannot constitute it as waste land within the meaning of that section. Otherwise land lying fallow for even one year would come within the definition."

We may say at once that we agree with these observations. To attract those provisions of S. 26, cl. (1) of the Estates Land Act relied on by the appellant it must be shown that the land at the time of the lease was (1) waste land, and (2) that the lease was given for clearing it and bringing it into cultivation. What is "waste land" has not been defined in the Estates

1. (1921) I L R 44 M 831: 41 M L J 346 (P C).
2. (1925) I L R 49 M 543: 50 M L J 589.

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Land Act, nor are there any decisions on the point explaining its meaning. It appears to us that the question whether a piece of land is waste land or not must depend upon the circumstances of each case and the evidence given in it. In order to be described as "waste land" the land need not necessarily be immemorial waste land; but if it has really never been cultivated, or at any rate has not been cultivated for a long period, it will come within the meaning of the term "waste land" used in the section. As we have already observed, in any particular case the question will be whether, having regard to the circumstances of that case and the evidence given in it, it can reasonably be said that the land in question is waste land. If so and if the lease is given to bring such land into cultivation, then the landlord is justified in assigning it on favourable rent. The question is essentially one of fact for the Lower Courts to consider on the evidence. In this case the Lower Courts have held that the land given on *cowle* under Exhibit II cannot be called waste land and the learned Judge has accepted the finding. There is abundant evidence to support this opinion. Exhibit II itself furnishes valuable evidence on this point. It shows that the land must have been under cultivation not very long ago and that there was a tank in it which was once in good condition. The evidence shows that up to 1895 this land was under actual cultivation. The mere fact that the land lay fallow for about five years cannot constitute it as waste land within the meaning of the section. The lease is not sought to be supported on any other ground. It therefore follows that the act of the plaintiff's predecessor in granting a permanent lease of the Devasthanam lands on favourable rent is not binding on his successor and he is therefore entitled to recover the rent claimed from the defendant.

We dismiss this Letters Patent Appeal with costs.

N. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

K. Srinivasamoorthi ... *Petitioner** (*P. W.* 5)

v.

Narasimhalu Naidu ... *Respondent* (*P. W.* 1).

Srinivasamoorthi *v.* Narasimhalu Naidu.

Criminal Procedure Code, S 520—Application under—Nature of—Appeal—Limitation provision as to—Applicability—S 517—Currency note stolen—Right to—Innocent holder from whom it was recovered—Complainant—Right of.

The phrase "Court of Appeal, confirmation, reference or revision" in S. 520, Criminal Procedure Code, only designates the Courts which can "modify, alter or annul" an order under the preceding sections, and does not specify the nature of the application which has to be made to them. The Court designated is given special jurisdiction to pass what orders it thinks fit, and it is not necessary to read into the section the provisions regarding appeals, *e.g.*, that of limitation.

Where the title to seized property is doubtful, it should be returned to the person from whom it was seized unless there are special circumstances which would render such a course unjustifiable.

Property to a currency note passes by mere delivery, and a stolen currency note should be returned to the innocent third party from whom it was recovered and not to the complainant, who lost it by the theft.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Additional District Magistrate of Tanjore in Criminal Appeal No. 18 of 1926 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Tanjore in C. C. No. 91 of 1926.

B. Sitarama Rao for petitioner.

A. Srinivasa Aiyangar for respondent.

The Public Prosecutor on behalf of the Crown.

The Court delivered the following

ORDER :—The question which arises on the merits of this case is whether a stolen currency note for Rs. 1,000 should be returned to the complainant, who lost it by the theft, or to the innocent third party, from whom it was recovered after passing through a Bank. Before, however, coming to the merits, a question of procedure arises. The Stationary Sub-Magistrate of Tanjore, who disposed of the theft case, directed that the note should be returned to the complainant. The subsequent recipient, now the petitioner, appealed against this decision to the District Magistrate, and the case was disposed

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*Cr. R. C. No. 925 of 1926. 21st April, 1927
(Cr. R. P. No. 801 of 1926)

Srinivasamoorthi v. Narasimhalu Naidu.

of by the Additional District Magistrate of Tanjore. He held that an appeal lay under the terms of S. 520, Code of Criminal Procedure, to the District Magistrate, but that the petitioner's appeal was time barred, and no satisfactory explanation had been given of the delay. He therefore dismissed it holding at the same time that he could not treat the application as a revision petition.

A revision petition is now preferred against this decision to the High Court.

It appears to me doubtful whether an application made under S. 520 to a 'Court of Appeal, confirmation, reference or revision' is in the nature of an appeal. The phrase I have quoted seems only to designate the Courts which can 'modify, alter or annul' an order passed under the preceding sections, and not to specify the nature of the application which has to be made to them. For analogous powers possessed by superior Courts reference may be made to S. 125, Code of Criminal Procedure, relating to the cancellation of a bond given for good behaviour, and to S. 195, Code of Criminal Procedure, relating to sanction to prosecute. It seems to me that in all these cases the Court designated has been given special jurisdiction to pass what orders it thinks fit, and that it is not necessary to read into the section the provisions regarding appeals. I have been unable to obtain any light upon this point from decided cases, since neither in *Kanshi Ram* v. *The Crown* (1) nor *In re Arunachala Thevan* (2) did the question arise in its present form; in the one the original order was passed by the Appellate Court; and in the other it was found possible to treat the proceeding as part of the criminal appeal. In these circumstances I hold that the application to the Additional District Magistrate was not an appeal and therefore not time barred. He had jurisdiction to entertain it, and his refusal to do so, in my view, enables this Court to entertain this Criminal Revision Petition.

On the merits the principle which I am disposed to adopt, and against the adoption of which I have not been shown any authority, is that where the title to seized property is doubtful, it should be returned to the person from whom it was seized unless there are special circumstances which would render such a course unjustifiable. In the present case there is no doubt

1. (1922) I L R 4 Lah. 49.
2. (1922) I L R 46 M 162: 44 M L J 56.

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that the petitioner received the note in all good faith, and the title is not so much doubtful as pretty evidently with him, as property to a currency note passes by mere delivery. That was the principle adopted in an old Madras case, *The Collector of Salem* (3) and *In re Pandharinath Pundlik* (4). The facts of the latter case were in essentials similar to those here. For the complainant it has been suggested that it is not for this Court in revising the Sub-Magistrate's order to interfere with his discretion. This argument receives no support from the terms of S. 520, Code of Criminal Procedure and since revision of the order may save subsequent litigation I think that there is ample ground for so revising it. Accordingly I allow the Criminal Revision Petition; set aside the order of the Lower Courts and direct the Sub-Magistrate to recover the currency note from the complainant (P. W. 1) and deliver it to the petitioner here (P. W. 5).

A. S. V. *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[IN THE ORDINARY ORIGINAL CIVIL JURISDICTION.]

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

K. Subbaroya Chetty ... *Plaintiff**

v.

Nagappa Chetti and others ... *Defendants.*

Subbaroya Chetty v. Nagappa Chetty.

Hindu Law—Partition—Suit for—Debts contracted by junior member—Charge on family properties—Equitable considerations—Joint owners—Payment to one—Right to a lien or charge, when arises—Ratification—Essentials—Sham transaction—Transaction treated as cancelled by consent of parties—Necessity to set aside.

A joint owner who comes to Court seeking a relief cannot obtain that relief unless he submits to a lien for his share of the money expended, which sum, the other owner has a right to recover by way of contribution.

Independent of joint ownership, a stranger expending labour or money upon the property of another, is entitled to repayment as well as a lien, provided circumstances exist from which, what is known as acquiescence in law, can be inferred. Before a lien can be supported on the ground of acquiescence, two ingredients must exist. First, it must be shown that the man making the payment was under a mistake with regard to the title which he had in the property and believed himself to have a larger title than he had. Secondly, it must be shown that the real owner knowing his own title and also knowing the other's mistaken belief in his supposed title had lain by, while the latter was laying out the money.

Independent of joint ownership, when a stranger expends money or labour upon the property of another, a claim to re-payment as well as

*C. S. No. 440 of 1926. 22nd April, 1927

3. (1873) 7 M H C R 233. 4. (1915) I L R 40 B 186.

Subbaroya Chetty *v.* Nagappa Chetty.

lien will be supported, provided there are circumstances to lead to the conclusion that there was a request, and such a request may be implied or inferred from circumstances however slight.

The plaintiff executed a release deed in favour of his father releasing all his rights in the family properties in consideration of certain properties allotted to him. The 1st defendant, the younger brother of the plaintiff, was a minor on the date of this release deed. The father borrowed money from the Mylapore Hindu Permanent Fund (3rd defendant) by executing a mortgage deed. At the time of the execution of this mortgage, the plaintiff passed a letter to the 3rd defendant disclaiming any interest in the property. Subsequently, the father died and, after the 1st defendant attained majority, the plaintiff and the 1st defendant entered into an agreement to treat the entire properties as joint family properties notwithstanding the release deed executed by the plaintiff, and in pursuance of this agreement a trust deed was executed in favour of their maternal uncle *S* who was requested to take possession of the properties, sell such of them as were necessary, pay off the debts and divide the residue in accordance with the agreement. *S*, however, did not enter upon his duties. The plaintiff took possession of all the properties and managed them The plaintiff subsequently wrote to the Fund to transfer in his favour the shares standing in the name of his father, alleging that the release deed was a sham document which was not acted upon. The Fund refused to comply with his request. There were various pressing debts due from the estate which had to be paid off. To clear off these debts, *S* applied to the Fund on behalf of the minor 1st defendant and obtained a loan by executing a mortgage deed as the guardian of the 1st defendant. The pressing debts were discharged out of the amount borrowed from the Fund. The evidence showed that the plaintiff recognised and adopted this transaction with the Fund and made several payments to the Fund not only towards the mortgage but towards share monies. The plaintiff brought the present suit for partition.

Held, (1) that the Fund (3rd defendant) was entitled to a lien or charge on the family properties in respect of the amounts utilised for family purposes and the plaintiff, who sought partition, was bound to submit to the lien,

(2) that there was no question of ratification of the transaction by the plaintiff, as it did not purport to be done for him,

(3) that there was no necessity to set aside the release deed within the period allowed by law, because the deed itself was treated as cancelled by mutual consent and act of parties and, besides, the transaction was from the very start a sham and a pretence.

V. Radhakrishnayya for *P. Krishnamachariar* for plaintiff.

V. Varadaraja Mudaliar, P. Venkataramana Rao for *K. S. Champakesa Aiyangar* and *R. Madanagopala Naidu, O. P. Srinivasan, C. Venkatasubbaramayya, V. Sivaprakasa Mudaliar, V. Viswanatha Sastri, R. Swaminatha Aiyar* and *N. R. Narasimha Aiyar* for defendants.

Subbaroya Chetty v. Nagappa Chetty.

The Court delivered the following

JUDGMENT :—This is a suit for partition. The plaintiff is the elder brother of the 1st defendant who was adjudicated an insolvent and whose estate the 2nd defendant the Official Assignee represents. The suit is withdrawn against the 4th defendant. The other defendants are alienees of various items of immovable properties, claiming on the strength of alienations made by or on behalf of the 1st defendant. The defendants 9, 10 and 11 were on their application removed from the record, the plaintiff not objecting to that course.

The plaintiff and the 1st defendant are the sons of one Ratnavelu Chetti who died on the 29th of December, 1913. His father is Ramaswami Chetti who died in 1895. A deed of release (also termed partition deed) was executed on the 30th of August, 1911 by the plaintiff. The joint family properties were valued at Rs. 12,900 and for the plaintiff's one-third share amounting to Rs. 4,300, he was given houses Nos. 15 and 16, Ramanan Street, Madras. On the same date, the plaintiff was made to execute a deed of gift conveying these properties to his wife who was a minor. The plaintiff alleges that this partition deed was a sham and make-believe and was not intended to take effect. At the time this release deed was executed the plaintiff had just attained majority. As I have said, Ratnavelu died on 29th December, 1913, that is about two years after the execution of this deed. Nagappa his other son was then a minor. He attained majority on 25th July, 1918. An agreement was then executed on the 9th December, 1918 between the two brothers who agreed notwithstanding the release deed to treat the whole property as joint family property. In pursuance of this agreement, a trust deed was executed on the 22nd of December, 1918 in favour of their maternal uncle one Singaram Chetti (now dead) who was requested to take possession of the properties and sell such of them as were necessary, pay off the debts and divide the residue in accordance with the agreement I have referred to, in equal shares between the two brothers, the plaintiff and the 1st defendant. If these two documents of the 9th and 27th December 1918 are valid and genuine, the plaintiff's case is unanswerable, but it is urged for the 1st defendant that he did not execute them of his own free will and should therefore be disregarded.

From what I have said, it will appear that while the plaintiff attacks the deed of 30th August, 1911 as a sham and a pre-

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tence, the 1st defendant impeaches the agreement and the trust deed of 1918 as inoperative and of no force. To start with, we find that the release deed of 1911 was by mutual consent treated by the later documents of 1918 as a transaction not binding on the plaintiff.

Having made these preliminary observations, I shall proceed to state and discuss the facts.

Ramaswami Chetti, the plaintiff's grandfather, was carrying on a trade in rice and died possessed of properties of some value. The trade was continued by Ratnavelu, his son, who apparently prospered. The plaintiff on the eve of his attaining majority showed himself a dissolute young boy. He began to execute bonds for large sums for petty amounts received. The father thought that his son would meet with the fate, which so often overtakes boys of rich families in this City, and accordingly he became disturbed and tried to find means to avert the disaster. A suit had already been filed against the boy in the Court of Small Causes and a plea was taken on his behalf that he was a minor at the time he passed the bond. The Judge upheld that plea and dismissed the suit. This was not a solitary instance, for Mariappa Naicker, the old clerk of the family, has deposed that the plaintiff had executed bonds in favour of about five other persons at that time. The father was no doubt able to circumvent one money-lender but it was impossible to take a hopeful view in respect of other claims which might be forthcoming. The plaintiff had become a major and the plea of minority could not safely be relied on. In these circumstances, the father desired that the property should be put out of the reach of the plaintiff's creditors and the release deed of 1911 was accordingly brought into existence. But the plaintiff could not be trusted even with a fraction of the family property and it was therefore resolved to settle even the little that was allotted to him upon his young wife. In fact, it was necessary to save the plaintiff from himself and this step was in the circumstances considered desirable and prudent. These facts are spoken to by the plaintiff (pp. 2 and 19) and by Mariappa Naicker (p. 99).

[Here as elsewhere in this judgment I shall economise space by merely giving reference to the pages of the transcript of the oral evidence.]

There is some little variation between the plaintiff and Mariappa Naicker, but, in my opinion, it is immaterial. The evidence stands uncontradicted and there can be no doubt that

the release deed was executed in the circumstances I have mentioned. A few months after the release deed the father Ratnavelu wanted to raise a loan from the 3rd defendant the Mylapore Fund. On the 10th of May, 1912 he executed a mortgage in its favour both for himself and as guardian of his minor son the 1st defendant and raised a sum of Rs. 12,000. The Fund, of course, would not lend the money unless satisfied that the plaintiff had no interest in the properties. He was therefore made to pass a letter to the Fund dated the 11th May, 1912 in which he referred to the partition with his father and stated he had no claim to the latter's property.

The question that has to be decided is was it intended to send the plaintiff out, stripped of all property or was the object to ward off trouble and to save the estate from the inroads of creditors?

His Lordship next discusses the evidence and continues thus:

I have come to the clear conclusion that the plaintiff is entitled as a member of the joint family to a half share in the suit properties. As the claim of the defendants 5, 6 and 7 is against what may be found to be the 1st defendant's interest only, it follows that in this suit for partition they can get no relief as they do not profess that their debts are binding on the family. On my finding, this position is conceded and I further understand that there is another suit in which they or some of them are pursuing their remedy against the 1st defendant. This disposes of defendants 5, 6, 7 and the absent defendant No. 8. As I have stated in the opening paragraph of my judgment the suit is withdrawn against the 4th defendant and is dismissed as against him without costs, as no costs are claimed. The only defendant whose case, it now remains to deal with, is the 3rd defendant (the Mylapore Fund). So far as its case is concerned, it requires a separate treatment in view of the case put forward and contentions urged for it. As in the course of the argument the expression 'equitable considerations' was freely used and as there is nothing more misleading than this term when its precise connotation with reference to proved facts is not kept in view, I shall try to analyse and set forth the facts bearing upon this portion of the case. As I have already said, the plaintiff executed a release deed in favour of his father on the 30th of August, 1911 and the latter on the 10th of May, 1912 borrowed money from the Mylapore Fund executing a mortgage in its favour. At the time of this mortgage the

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plaintiff, as I have said, passed a letter to the Fund dated the 11th May, 1912 disclaiming any interest in the property. After the death of Ratnavelu, Subbaroya took possession of the family properties and managed them as if there had been no release at all. I have referred to these various acts of management and it is not necessary to refer to them again. In 1916 the plaintiff wrote to the Mylapore Fund requesting it to transfer in his favour the shares standing in the name of his father. The Fund in reply called upon the plaintiff to produce the partition deed of 1911. At that juncture Subbaroya wrote to the Fund a letter the contents of which are very important. He wrote to say that the partition with his father was effected for ulterior purposes and that it was not binding upon him and requested the Fund to recognise him and his brother as persons legitimately entitled to the shares in question. The Fund on the 7th of September, 1916 replied stating that Subbaroya's request could not be complied with as he had become divided from his father. The matter was allowed to drop at this stage and nothing further was done.

In the meantime it was found that there were various debts due from the estate which had to be paid off. Monies were due on promissory notes executed by Ratnavelu to one Seshadri Aiyangar to whom I have already referred, whose debts were kept alive by payments of interest by Subbaroya in the course of his management. Now, this Seshadri Aiyangar filed a suit in the High Court against the plaintiff as well as Nagappa. An amount was also due to one Venkatesam Chetti (already referred to) in whose favour the father had executed a promissory note. Towards this debt also Subbaroya had made a payment and there was still a balance due. There was a third creditor, Ammakannu Ammal, from whom also the father had borrowed an amount. These were the various sums then due, not to speak of some amount which was owing to the Mylapore Fund itself. It became imperative to pay off these debts. The question was, how was the money to be found? The title put forward by Subbaroya, the Fund refused to recognise and it was obvious that Subbaroya could raise no money from that source. But money was wanted. The mother of the plaintiff and Nagappa had died and their nearest relation was their maternal uncle, Singaram. This man now came forward professing to be the natural guardian of the minor Nagappa. We must look at the position of affairs as they appeared to be at that time. The title set up by the plaintiff was adverse to that

of Nagappa and in the latter's interests an independent and disinterested guardian was necessary. There can be no question that Singaram answered this description. He wrote to the Fund on 3rd June, 1917 setting up the exclusive right of Nagappa and asking for the transfer of shares in his name. The Fund informed Singaram on 25th June, 1917 that the transfer was accordingly effected. Now, Singaram negotiated with the Fund for a loan and as under the rules of the Fund the borrower must take a certain number of shares, 170 shares were taken and an application was made for a loan of Rs.17,000. The shares were taken in the name of the minor, the application was made in his name and eventually a mortgage deed was executed on the 9th of October, 1917 by Singaram acting as the guardian of Nagappa. To the extent to which it is proved that the money borrowed was applied for the minor's purposes, the transaction would be clearly binding on him. It signifies little whether Singaram was his *de facto* or *de jure* guardian. Subbaroya as I have said was incompetent to act for the minor. What was presumably the minor's exclusive property was threatened and it was highly necessary that some steps should be taken to preserve that property. Those interested in the minor would be failing in their duty if they allowed Subbaroya to act upon the footing that the minor was entitled only to a moiety. In these circumstances I regard that Nagappa is bound by the act of Singaram and the only question is, how much of the Rs. 17,000 raised from the Fund was really utilised for purposes connected with this estate? So far I find no difficulty, but the really important question is, is the plaintiff bound by this transaction? It is idle to suggest as against him that he was not really managing the property but he found himself in a position of great difficulty. He did not wish to abandon his right based on a status of non-division. But how was the money to be raised? Singaram came forward and was prepared to get an advance by putting forward Nagappa's exclusive title. Subbaroya was equally anxious to get the money and if it could be got without his sacrifice of his own interests he was prepared to take it and benefit by it. He was careful not to make any statement which would jeopardise his own right and I may state in this connection that the argument that the facts raise an estoppel as against him is absolutely untenable. Every element requisite for estoppel was wanting. Far from misleading the Fund, he stated to it in unequivocal terms that he claimed a right in the property. To return to the main point, I enter-

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tain not the slightest doubt that Subbaroya was aware of these negotiations, that he took an active part in them, that he utilised the money when it was actually raised and in every possible way recognised and adopted the transaction after it was entered into. We must for this purpose look at the act of Singaram as if it was the act of Nagappa himself. One part owner then having in truth a joint interest but believing himself to be solely entitled, makes disbursements for the preservation of the estate. The other part owner acquiesces in the laying out of the money and in the creation of the charge knowing full well that these acts were necessary for the preservation of the estate. On a careful consideration of the evidence I am prepared to record this finding on the facts proved, nay more; I am even prepared to infer from the circumstances a request (expressed request is quite as good as an implied request) by Subbaroya that the loan should be raised and the charge created. The Fund paid to the various creditors of the estate the amounts due to them. The debt due to Seshadri Aiyangar was *inter alia* paid off and his suit was withdrawn. It is unnecessary to refer to the exhibits bearing on this question as these facts are not disputed. There is, however, a very important fact which must be noticed. (I say important, because this is brought home to the plaintiff by a writing signed by him.) When the Fund paid off the debt due to Venkatesam Chetti soon after the mortgage in question, he made an endorsement on the back of his promissory note stating that he received the sum from the Fund and that the promissory note was thus cancelled. This endorsement, the plaintiff himself attested and this fact of course must be emphasised in this connection. What is even more, from the date of the mortgage onwards Subbaroya recognised and adopted the transaction. He made several payments to the Fund not only towards the mortgage but toward share monies. In 1919 he paid three sums of Rs. 600, Rs. 246-6-3 and Rs. 261-12-0 and again in 1922 he paid three sums each of Rs. 500. These are by no means the only payments made by him, for from almost the date of the mortgage, several sums were paid for interest to the Fund and it is not pretended that anybody else was interested in making these payments. Nagappa was not in a position to make, for he was a minor and further never attended to business. Singaram did not make them, for he really never managed the property and never got into his hands monies of the estate. The payments to which I have referred are proved by the books of the plaintiff himself who has not

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been able to produce all the books relating to the business or the estate and if they had been produced, for every payment appearing in the books of the Fund, there would be found (I have not the slightest doubt) a corresponding entry in the books of Subbaroya.

Mr. Radhakrishnaiya has argued that at the best Nagappa may have a personal right of contribution as against the plaintiff, but the charge on the property cannot be supported so far as he is concerned. To deal with this argument properly, it has become necessary to review the facts at some length. Now that I have discussed the evidence and stated my findings, I shall proceed to consider what the correct legal position is. There are two cases which I regard as extremely valuable and instructive. The first of them is *Leslie* v. *French* (1). In that case Fry, L. J., dealing with the cases where a lien arises in favour of a person making a payment, observes that generally the right to contribution is a personal right and the remedy is a personal remedy and mentions an exception to this general rule, that is, where a relief is sought by a party, he cannot obtain that relief unless he accepts a lien in respect of his share of the *disbursements made*. Fry, L. J., had to recognise the exception on account of the cases where a Court of Equity refused to grant partition to one co-tenant except upon the condition of his submitting to a lien for the expenditure made by the other co-tenant in respect of the property. *Swan* v. *Swan* (2) cited in the judgment is an instance of this kind. According to this principle, the plaintiff, who in the present case seeks partition, is bound to submit to the lien.

Apart from this, can a part-owner generally claim lien for payments made as against the other part-owner? Fry, L. J., thinks that except by contract he cannot acquire such a right. It is unnecessary in the present case to consider whether this rule is absolute or subject to any qualification. I shall content myself with saying that Story states the law somewhat differently in the following passage: "Another species of lien is that which results to one joint owner of a real estate, or other joint property, from repairs and improvements made upon such property for the joint benefit, and for *disbursements touching the same*. This lien, as we shall presently see, sometimes arises from a contract, express or implied, between the parties, and *sometimes it is created by Courts of Equity, upon mere principles of general justice*, especially where any relief is sought by

1. (1883) 23 Ch. Dn. 552. 2. (1819) 8 Price, 518.

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the party who ought to pay his proportion of the money expended in such repairs and improvements." (Story on Equity, (1920) 3rd Eng. Edn., p. 521.)

This passage does not confine the lien as between joint owners to cases of a contract merely; on the other hand, it expressly recognises a lien created upon principles of natural justice. In the present case I do not propose to base my judgment upon general equity adverted to by Story as the plaintiff's liability becomes established even upon the narrower ground recognised by Fry, L. J., and referred to in the last clause of the passage which I have extracted from Story.

I have now dealt with one case where Courts of Equity support a claim to lien. There are other circumstances which may give rise to a lien. Fry, L. J., in the case I have cited points out that a person may become entitled to a lien on the ground of the acquiescence of the other persons interested in the property. This principle is amplified and stated with great lucidity in *Falcke* v. *Scottish Imperial Insurance Company* (3), this being the second of the two cases to which I have referred as throwing valuable light upon the subject. It is a decision of the Court of Appeal and one of the judgments in that case again is that of Fry, L. J. Before a lien can be supported on the ground of acquiescence, two ingredients must co-exist. First, it must be shown that the man making the payment was under a mistake with regard to the title which he had in the property and believed himself to have a larger title than he had; and secondly, it must be shown that the real owner knowing his own title and also knowing the other's mistaken belief in his supposed title had lain by while the latter was laying out the money. This principle clearly applies to the facts of the case as I have found. It may be noted that this is not a rule which is confined in its operation to joint owners but may be invoked in favour of any stranger who expends labour or money with a view of saving or benefiting the property or the goods of another.

There is a further and a third ground on which a claim to lien may be successfully based. That is referred to in the judgments of Cotton, L. J., and Bowen, L. J., in *Falcke* v. *Scottish Imperial Insurance Company* (3) which I have already cited. If a stranger does work upon, or makes a payment in respect of, a property belonging to another without request, he gets no lien on the property for the work done or money expended. But

3. (1886) 34 Ch. Dn. 234.

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a claim may be based upon a contract to repay or to give a lien. Under the Common Law, without such a contract being found, no claim can be successfully advanced. Cotton, L. J., says in his judgment :

"If here, there had been circumstances to lead to the conclusion that there was a request by Falcke that this premium should be paid by Emanuel, then there would be a claim against Falcke or his representative for the money, and I do not say *that there might not be a lien on the policy.*"

This right to lien, apart from the personal right, is referred to both in the judgments of Cotton, L. J., and Bowen, L. J. Then what I consider to be of the utmost importance as having a bearing on the present case is enunciated in the same judgments. The principle may be put in the words of Cotton, L. J.:

"I think that in a case of this sort, when money is paid in order to keep alive property which belongs to another, a request to make that payment might be implied *from slight* circumstances."

This is after all not a rule of law but a valuable rule of guidance in approaching and valuing the evidence in a case. This is based upon natural justice and the reason of the thing and the present case is eminently one where this rule may be usefully applied. I shall now sum up the three grounds in law, which I find are material in the circumstances, on which a claim to lien may be supported.

(1) A joint owner who comes to Court seeking a relief cannot obtain that relief unless he submits to a lien for his share of the money expended, which sum, the other owner has a right to recover, by way of contribution.

(2) Independent of joint ownership, a stranger expending labour or money upon the property of another is entitled to repayment as well as a lien, provided circumstances exist from which, what is known as acquiescence in law, can be inferred. In this connection I may quote another passage from the judgment of Cotton, L. J. (3):

"It is very true that if a man who has a title to property sees another expending money upon it in the erroneous belief that he has a title to it when in fact he has no title to it, there is an important doctrine of Equity which will prevent the real owner from insisting on his title so as to deprive the person who was acting on the supposition of his own title of the benefit of his expenditure."

(3) Independent again of joint ownership, when a stranger expends money or labour upon the property of another, a claim to repayment as well as lien will be supported,

3. (1886) 34 Ch. D 234 at 242, 243.

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provided there are circumstances to lead to the conclusion that there was a request, and in this connection it must be remembered that such a request, as a question of evidence, will be implied or inferred from circumstances however slight.

On the facts of this case I am satisfied that the charge can be supported on all the three grounds I have mentioned. If Nagappa can enforce the charge against the plaintiff, the Fund by subrogation to that right can equally enforce it. This right of subrogation is generally recognised. The real difficulty is in deciding whether the party who made the disbursements can create a lien, or is entitled to it. If the question is answered in his favour, the right of the man who advanced the moneys to stand in the shoes of the former clearly and necessarily follows.

I may mention that, in the course of the trial, I gave ruling disallowing questions directed to show that Subbaroya ratified the transaction. For, on the facts of this case, it is impossible even to conceive of a case of ratification. As Bowen, L. J., observes in *Falcke* v. *Scottish Imperial Insurance Company* (3) already referred to:

"There is no such thing in law as adopting or ratifying anything except where there is the sanctioning of an act professedly done on your behalf in such a sense as to make you liable for it. A man can ratify that which purports to be done for him, but he cannot ratify a thing which purports to be done for somebody else. Ratification only takes effect in law from its being equivalent to a previous authority.'

In the view I have taken it is unnecessary to refer in any detail to the various cases cited to me in the very learned and elaborate arguments on this point of Mr. Radhakrishnayya for the plaintiff and of Mr. Venkataramana Rao for the Fund. I may however briefly notice three of the several cases which were cited for the plaintiff.

In *Nathu Piraji* v. *Balwantrao* (4) and *Ammani Ammal* v. *Ramaswami Naidu* (5) there was no question of joint ownership, or of acquiescence, or of implied request. These authorities cannot be of much assistance in deciding on the facts of the present case. Next, *Balwant Singh* v. *Clancy* (6) has been strongly relied on for the plaintiff. I have very carefully read the judgment of the Privy Council and I cannot say that the question that is now raised was considered by their Lordships.

3. (1886) 34 Ch. D 234 at 250. 4. (1903) I L R 27 B 390.
5. (1918) 37 M L J 113.
6. (1912) I L R 34 A 296: 23 M L J 18 (P C).

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Another question has been raised by the defence, namely, that the suit is barred by limitation. The argument was put in this way: Subbaroya ought to have brought a suit to set aside the document of 1911 within the period allowed by the law. He did not do so and, therefore, this suit is barred. There are two obvious answers. In the first place, there was no need to get the document set aside by a Court, as, by mutual consent and act of parties, that document was treated as cancelled. In supersession of that document, an agreement to divide the property and a trust deed were executed in 1917. When a party obtaining an advantage under a document voluntarily chooses to treat it as inoperative and of no effect, it is wholly unnecessary to come to a Court seeking an idle relief. Secondly, the case cited by Mr. Radhakrishnayya, *Petherperumal Chetty* v. *Muniandy Servai* (7) directly applies. The transaction was from the very start a sham and a pretence and there is no need to get such a transaction formally set aside. I may point out that there is no evidence that any creditor was defeated as a result of this release deed. Even a contention to this effect has not been advanced. This objection is therefore overruled.

Then it is said that the plaintiff has included in his plaint a prayer for a declaration that the various alienations made by Nagappa are not binding upon the plaintiff's interest. It is contended that the suit is barred by limitation as the relief claimed is such a declaration. This objection is again untenable. If the plaintiff seeks to get rid of his own acts, no doubt he must first get the transactions set aside. But the plaintiff was no party to these alienations, and it is indifferent to him whether the deeds are cancelled or not. The prayer regarding declaration is, in the circumstances, absolutely meaningless and may be disregarded. It must be noted that the alienations complained against were not only made by a junior member of the family but were made by him in denial of the plaintiff's right. The suit is really and substantially one for partition of joint family property and the rules of this Court make it incumbent upon the plaintiff in such an action to implead the alienees where the alienations are not admitted by him to be binding upon the family. (*See R.* 421 *of the Original Side Rules.*) It cannot be disputed that the suit regarded as a suit for partition, which in truth it is, is not barred by limitation.

7. (1908) I L R 35 C 551 : 18 M L J 277 (P C).

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This ground also fails. I must therefore hold that the suit is not barred.

Lastly remains the question out of the Rs. 17,000 raised from the Fund, how much was utilised for family purposes? The following valid payments have been proved:—

1.	Rs. 2,653 5 2,	balance due to the Fund on the old debt of 1912.
2.	„ 6,400 0 0	paid to Seshadri Aiyangar.
3.	„ 3,764 8 3	paid to Venkatesam Chetti.
4.	„ 3,030 0 0	paid to Ammakannu Ammal.
	Rs. 15,847 13 5	

The balance of Rs. 1,152-7-0 was paid by the Fund in cash to Singaram. It has not been shown that this sum was utilised for the benefit either of the plaintiff or the 1st defendant. Indeed, no attempt has been made to show as to what was done with this balance. I must therefore hold the Fund to be entitled to Rs. 15,847-13-5 and interest thereon less payments made.

What then is the decree to be passed in the case? On my findings, the plaintiff will be entitled to a preliminary decree for partition and I pass that decree accordingly. I make a declaration that the only debt binding upon the family is that due to the Mylapore Fund, the 3rd defendant. Before the properties are partitioned I direct that this debt shall be paid off. There is no dispute that the plaintiff and the 1st defendant are each entitled to a half.

As regards costs, my decision is that the plaintiff shall recover the full costs of the suit (less the hearing fee paid for the last five days of hearing) from the 1st, the 2nd, the 5th, the 6th, and the 7th defendants in the following proportion: From the 7th defendant ⅛, from the 1st and 2nd defendants 1|3 of the balance, from the 5th defendant similarly 1|3 and from the 6th defendant also 1|3. I allow the plaintiff two vakils' fees. I do not propose to award costs to the Fund although it has substantially succeeded in the suit. My reason is, that much of my time has been wasted by necessary contentions on its behalf being raised only at a late stage of the trial. As a matter of indulgence I allowed Mr. Venkataramana Rao to appear at that stage and argue the points.

The case is referred to the Official Referee for effecting a division of the properties in accordance with this judgment.

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N. S. *Suit decreed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT :—VISCOUNT DUNEDIN, LORD SHAW AND LORD SINHA.

Abdul Wahab Khan ... *Appellant** (*Defendant*)

v.

Tilakdhari Lal and others ... *Respondents* (*Plaintiffs*).

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Abdul Wahab Khan v. Tilakdhari Lal.

Hindu Law—Joint family—Formal partition or arrangement merely for convenience of management—Separation in mess and residence, and exclusive collection of rent for over 40 years.

Three brothers, members of a joint Hindu Dayabhaga family, separated in food and residence more than forty years ago, and an arrangement was then come to, whereby possession of the lands was distributed between them, and the lands were thenceforth in the separate and exclusive possession of each of the three co-sharers, who separately collected the rents according to their respective shares. The question being now raised whether this was merely for convenience of management or in pursuance of a formal partition of the estate, the Judicial Committee held, on the facts (differing from the High Court) that the arrangement for the exclusive collection of rent, etc., proved that there had been a formal partition between the parties.

Judgment of the High Court reversed.

Appeal (No. 45 of 1926) from a judgment and decree of the High Court, Patna (Sir Dawson Miller, Chief Justice and Mr. Justice Foster), dated the 6th March, 1925, which reversed a decree of the Subordinate Judge of Monghyr, dated the 28th April, 1921, dismissing the plaintiff's suit for partition.

The facts are stated in the judgment of the Judicial Committee. The case in the Court below is reported in 89 I. C. 913 and A I R 1926 Patna 112.

De Gruyther, K. C., and *Dube* for appellant.

Lowndes, K. C., and *Raikes* for respondents.

4th July, 1927. The Judgment of their Lordships was delivered by

Lord Sinha.

LORD SINHA.—This is an appeal from a decree of the High Court of Judicature at Patna, dated the 6th March, 1925, reversing a decree of the Subordinate Judge of Monghyr, dated the 28th April, 1921.

That decree dismissed a suit brought by the plaintiff, Tilakdhari Lal (now respondent), against the defendant, Abdul

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Wahab Khan, and others, for partition of an estate comprising the villages of Tetulia, Hardia, Belhanda and Dhamhare. and bearing Tauzi No. 4920 on the rent roll of the Collector of Monghyr. The High Court decreed partition.

That estate had originally formed part of a larger estate named Tappa Chautham, and received its separate Tauzi No. 4920 when carved out of the parent estate more than forty years ago. At that time its proprietors were Hansraj Singh, Bhukhan Singh and Totaram Singh, who formed a joint Hindu family.

These three persons separated in board and residence in or about 1876, and either then or afterwards separate accounts were opened for each of their shares in the estate Tauzi No. 4920 under Act XI of 1859. The estate, however, was not partitioned under the Estates Partition Act, but the principal defendant (Abdul Wahab Khan) alleged that there was an amicable partition between the parties of the lands comprised in the said villages whereby (1) some of the lands were thenceforth in the separate and exclusive possession of each of the three co-sharers, who separately collected the rents from the tenants of those lands, (2) in respect of some others they collected the rents each according to his share, and (3) some waste or uncultivated lands held jointly.

On the 15th May, 1888, Ram Kishun Singh, the son of Hansraj Singh (then deceased), sold to one Nawab Khan a three-annas share in the estate out of his one-third share of 5 annas 14 gundas 6 dants, and thereafter Nawab Khan had a separate account opened in the Collectorate in respect of his purchase.

Plaintiff, Tilakdhari Lal, for himself and his deceased brothers, also purchased, by a series of sale deeds from different co-sharers in Tauzi No. 4920 shares which in the aggregate amounted to 7 annas 2 cowries 5½ dants, and in respect of which also a separate account in the Collectorate was opened.

He thereafter applied to the Collector for a partition of the estate No. 4920 under the Estates Partition Act, but that application was opposed by Nawab Khan, and the Revenue authorities finally rejected it on the 3rd April, 1919.

The plaintiff filed this suit for a partition of all the lands comprised in the said four villages by the Civil Court on the 14th January, 1920, against all the proprietors of estate No.4920. Such partition would leave the estate an entire unit *quo ad* the

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Revenue authorities, but would nevertheless be binding as between the co-sharers themselves.

The principal contending defendant was Nawab Khan's son and representative (now appellant), whose estate is under the Court of Wards; and on his behalf the suit was resisted on the ground that all the lands, with the exception of a small quantity of waste or uncultivable lands, had been partitioned amicably between the parties twice before, once as between the three original proprietors, when each branch divided the lands (with the exception above named) into three several shares, and once again as between himself and his vendor.

It is the first partition which is important, as the second depends on the first. The material issues on the pleadings were:—

(1) Whether the suit is barred by limitation.

(2) Whether there has been a private partition.

The Subordinate Judge found in favour of the defendant on both issues, and, inasmuch as the suit was for the partition of the whole of the lands, and not merely of the undivided waste, dismissed the plaintiff's suit.

On appeal to the High Court this decision was reversed on the ground that the alleged partitions were not proved and that there had been no such adverse possession as could create a separate title in favour of the defendant.

Their Lordships have therefore found it necessary to consider the whole of the evidence, both oral and documentary.

It is an undisputed fact that more than forty years ago, when the family separated in food and residence, some arrangement was come to between Hansraj Singh and his brothers whereby possession of by far the larger portion of the lands was distributed between them. With regard to some, it was arranged that the rents should be collected separately according to their respective shares; with regard to others, that they should be in the exclusive possession of each co-proprietor. The plaintiff alleges that this was merely for convenience of management. The defendant asserts that it was in pursuance of a formal partition.

The learned Chief Justice of the Patna High Court was of opinion that the present state of affairs may quite possibly be explained on either hypothesis, but he considered that certain facts pointed strongly to the absence of any formal partition having taken place, in particular the absence of any deed, document or writing in connection with such partition.

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That, no doubt, is an important fact to bear in mind. It has also been urged before this Board that the plots of land which are in the exclusive possession of the proprietors are described in rent receipts and zamindari papers as *kamat*, which tends to show that they may have been taken without any formal division. But, on the other hand, there are other undisputed facts which point so strongly in the opposite direction that their Lordships have come to the conclusion that such oral evidence as there is in support of a formal partition was rightly accepted as correct by the Subordinate Judge.

These facts are:—

(1) That the rents for definite and specific plots of land have been paid exclusively to the several proprietors for so long a period without dispute and without any subsequent adjustment or distribution;

(2) That there has been not only this appropriation of rents for separate plots, but when some of these were compulsorily acquired for a railway in 1903 under the Land Acquisition Act, the compensation monies were separately paid and appropriated by the separate proprietors who had been previously collecting the rents in respect of those lands;

(3) When a Record of Rights was prepared of these villages under the Bengal Tenancy Act and finally published in 1903, the plots referred to in (1) and (2) were recorded as being the separate property of their respective landlords, without any dispute or controversy on the part of the others; and

(4) The very appearance of these separated holdings, *i.e.*, the plots from which rents are collected exclusively, on the map prepared for the purposes of this case, which lie not in three compact blocks but in many cases isolated and scattered, seems to negative the theory that the arrangement for exclusive collection of rent was for convenience of management.

For these reasons their Lordships will humbly advise His Majesty that the judgment of the High Court should be set aside and the judgment of the first Court restored, with costs in both Courts and the costs of this appeal. This will be without prejudice to the right of the plaintiff to sue for partition of the lands which are admittedly still undivided.

Solicitor for appellant : *H. S. L. Polak*.

Solicitors for respondents : *Watkins & Hunter*.

K. J. R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR MURRAY COUTTS-TROTTER, *Kt., Chief Justice* AND MR. JUSTICE WALLACE.

Sri Rajah Rao Venkatakumara Mahipathi Surya Rao Bahadur Varu, Maharaja of Pithapuram ... *Appellant**

v.

Sri Rajah Rao Venkata Mahipathi Gangadhara Rama Rao Bahadur ... *Respondent.*

Maharaja of Pithapuram *v.* Sri Rajah Rao Venkata Mahipathi Gangadhara Rama Rao Bahadur.

Letters Patent (Madras), cl 15—Judgment—Leave to sue—Order granting or refusing to revoke grant ex parte*—If and when a judgment —Appealability of.*

The grant of leave to sue is a judgment within the meaning of cl. 15 of the Letters Patent, if the order has finally shut out the defendant from pleading or being heard on the question that the suit should have been dismissed on the point of jurisdiction, if, in other words, the refusal to dismiss the suit is in effect a final judgment against a dismissal of the suit on the ground of jurisdiction. But if the question of the jurisdiction of the Court to entertain the suit is still open for decision at the trial of the suit, then the order granting leave to sue or refusing to revoke an order granting leave to sue is not of a final nature and would not be a judgment.

Where leave of Court was obtained under clause 12 of the Letters Patent on the footing that part of the property sued for was situated within the local limits of the original jurisdiction of the High Court,

Held that the defendant was not thereby precluded from showing at the trial that the inclusion of a particular item of property, which alone would give jurisdiction to the Court, was not *bona fide,* and that the Court had therefore really no jurisdiction to entertain the suit.

Held further that the order refusing to revoke leave granted *ex parte* in such a case was not a judgment within cl. 15, and that no appeal lay against it.

On appeal from the judgment of the Hon'ble Mr. Justice Srinivasa Aiyangar dated the 6th May, 1926 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 242 of 1926.

The facts giving rise to this appeal are as follow :—

This suit was instituted by the eldest son of the adopted son of the late Rajah of Pithapuram against the defendant, the present Maharaja of Pithapuram, the aurasa son of the late Rajah. On the death of the late Rajah of Pithapuram the adopted son filed a suit O. S. No. 6 of 1891 on the file of the District Court of Godavari for recovery of the zemindari properties denying the sonship of the present defendant and impugning the wills made by the late Rajah in his favour. The High Court and Privy Council negatived his claim, upholding the title of the defendant on the basis of the

*O. S. A. No. 51 of 1926. 4th May, 1927

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wills of the late Rajah and expressly refrained from discussing the question of the aurasa sonship of the defendant as that would be a waste of time of the Courts and needless expense to the parties. The case is reported in (1896) I L R 20 M 167 : 6 M L J 218 and (1899) I L R 22 M 383 : L R 26 I A 83 : 9 M L J Suppt. 1 (P. C.). The adopted son died on 4th April, 1914 and this suit was instituted by his eldest son, alleging negligence in the conduct of the suit on the part of his father and claiming an independent title on himself on 6th April, 1926, on the Original Side of the High Court. The suit plaint included a claim for the recovery of a house known as "Dunmore House," Teynampet, purchased by the defendant in 1910 from Mrs. Norton and hence it was alleged that part of the cause of action arose within the Ordinary Original Civil Jurisdiction of the High Court. Leave to sue under cl. 12 of the Letters Patent was granted *ex parte* by V. V. Srinivasa Aiyangar, J., on 6th April, 1926. The defendant immediately on hearing of the institution of the suit took out a Judge's summons to show cause why the leave granted should not be revoked. When this came on for hearing before the same Judge, his Lordship delivered the following judgment dismissing the motion:—

JUDGMENT :—On this summons taken out on behalf of the defendant in this suit, the Maharaja of Pithapuram, the application is made for the revocation by the Court of the leave to institute the suit in this Court granted by me originally *ex parte* to the plaintiff in the action.

As intimated by me in the order granting leave I would not have granted such leave to the plaintiff *ex parte* had not the application for it been made to me under circumstances capable of being regarded as rather extraordinary. It was then stated that in one view that date may be regarded as the last day of limitation. Though therefore in ordinary circumstances I would have required notice to issue to the intended defendant before granting leave in such a case, I granted the leave applied for at the same time intimating that I was doing so in the special circumstance of the case and more especially in view of the fact that it would be open to the defendant to come in afterwards and, if so advised, to apply for revocation of the leave. He has apparently been so advised and this is the application.

The plaintiff's action is mainly for the recovery of possession from the defendant of the villages constituting various zemindari estates, all in the District of Godavari. Regarding as a suit for land as conceded on both sides that it should be, the only immoveable property claimed in the plaint and situate within the local limits of the ordinary jurisdiction of this Court is the garden and bungalow known as "Dunmore House" in Teynampet. Mr. S. Srinivasa Aiyangar for the applicant-defendant no doubt intimated that it would be open to him to contend that on a proper construction of cl. 12 of the Letters Patent in respect of suits for lands to be instituted in this Court the whole of the land should be situated

within the local limits. But he intimated he would not do so for the purposes of this application in this Court having regard to the interpretation placed on the clause in a series of decisions extending over many decades and recognised and acted upon by all the Courts in India. That rule is that if only part of the land sued for is situate in Madras, the suit may be instituted in this Court after obtaining leave. In this respect the situation of the land, the subject-matter of the suit is no doubt, as pointed out by Mr. S. Srinivasa Aiyangar in his learned argument, in the same position as the cause of action for a suit which is not one for land with respect to which it is provided that if only part of the cause of action should have arisen in Madras the suit may be instituted with similar leave. With regard to the part of the cause of action which may be alleged to have arisen within the local limits of Madras the decisions are all uniform and need not be referred to here, which have laid down that the part of the cause of action arising in Madras should be a material part.

On this analogy the learned Vakil for the defendant argued that in suits for land that part of the land within Madras should be a substantial part. That position may easily and in my judgment must be conceded. There can also be no doubt that that is the principle on which at any rate this Court has been acting in granting or refusing leave to sue in respect of suits for land. In the present case out of 197 items of immoveable property claimed, only one item, namely the "Dunmore House," is situate in Madras and with regard to the value of that one property it may be taken to represent only less than one-thirtieth of the whole. In this view the present case is undoubtedly a fit and proper case in which, ordinarily speaking, leave to institute the suit would or should not have been granted and therefore a proper case in which the leave granted *ex parte* should be revoked.

A further contention has also been advanced on behalf of the defendant-applicant. It was argued by Mr. S. Srinivasa Aiyangar that if in any case it should be found that the inclusion of the land situate within the local limits in the claim set forth in the plaint by the plaintiff has been not *bona fide* but only for the purpose or ulterior reasons of instituting the suit in Madras then the Court would be acting properly if it should refuse leave or revoke the leave granted *ex parte*. I entirely agree with such a contention, and as I do so I do not consider it necessary to refer in detail to all or even any of the cases cited by him on the point. It is a sound and established principle of law that no litigant should be enabled to invoke the jurisdiction of a Court either by the inclusion in the claim of false or fictitious items or of any part of the claim which the Court may reasonably regard as included not *bona fide* but only for the purpose of invoking such jurisdiction. In the view I have taken of the facts of this case and of the order I propose to make it seems to me unnecessary to deal with this argument at great length.

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The plaintiff is the son of the adopted son of the late Maharaja of Pithapuram and he claims to have succeeded to most of the zamindari estates set out in the schedule to the plaint on the ground of his having on the death of his father succeeded thereto by inheritance. The property known as "Dunmore House" was purchased on the 24th of May, 1910, and was not in any ordinary sense of the term part of any of the said estates or zamindaries and was admittedly purchased by the defendant presumably from and out of the income of the zamindaries.

The plaintiff's case is that the defendant has been in possession of the zamindaries as mere trespasser. The income therefore of the zamindaries in his hands could not conceivably be regarded in any sense as trust monies or monies held in any fiduciary character so as to be capable of being traced and followed in any investments that may be made thereof. There are also no allegations in the plaint which may even otherwise be regarded as sufficient to raise any question of the Dunmore House being an accretion to the zamin estate. Mr. T. R. Ramachandra Aiyar, the learned Vakil for the plaintiff, said that this allegation with regard to Dunmore House in the plaint in paragraph 19 is that that it is part of the Pithapuram zamindari as having been an accretion to it and that he was going to establish it was a matter merely of evidence and argument and need not be set forth in the plaint. It is not possible to agree with such a contention. In the absence of any allegation which can be regarded as at any rate, reasonably sufficient to raise a triable issue regarding the Dunmore House being an accretion to the Pithapuram zamin, I cannot possibly hold the inclusion of the claim in respect of Dunmore House as *bona fide*. I feel no doubt whatever in my mind that if the plaintiff had to institute the suit in the Court of Godavari he is not likely at all to have included any claim in respect of Dunmore House. I have therefore a very strong suspicion and I have practically no doubt whatever in my mind that that property has been included in the plaint merely for the purpose of making it appear that some portion of the land claimed was situate within the jurisdiction and that therefore the plaintiff was entitled with leave to institute the suit in this Court.

In ordinary cases where the Court comes to such a conclusion it would be almost incumbent on the Court to revoke any leave to institute a suit that might have been granted *ex parte* to the plaintiff. In the absence therefore of any other circumstances I should have had very little hesitation in this case on the present application to allow it and revoke the leave.

But there are certain special circumstances in this case which also have to be taken into consideration before coming to a decision. It is said on behalf of the plaintiff that in one view his claim may come to be regarded as barred by the law of limitation if the present suit should for any reason not be held to be proper and he should be driven to institute a new suit in respect of the zamindaries in the Godavari Court. Mr. S. Srinivasa Aiyangar almost persuaded me by his argument that there is really nothing

in this apprehension about limitation because on a proper consideration of the allegations in the plaint it is clearly a case which is either hopelessly barred or one for which there is still a long period available for filing a suit before it can be barred. If it were a case of a suit filed not in this Court as a Court of Record but in any other Court in the country and the plaint could be returned for being presented to the proper Court, there might perhaps be not great harm. Even then, however, questions may arise as regards the *bona fide* institution of the suit in this Court. On the meagre argument which alone I have heard with regard to the question of limitation it is impossible for me to decide definitely and I should be loath to do so even if I could. There may after all be something in the point of view suggested by Mr. T. R. Ramachandra Aiyar for the plaintiff. In any case by my revoking the leave at present the damage to the plaintiff may turn out to be enormous and irreparable. He has further paid into this Court as and by way of Court-fee nearly Rs.12,000. If this Court were not a Court of record and if the practice in this Court had been as in other Courts to return to the plaintiff the plaint in cases in which it is held that the Court has no jurisdiction for being presented to the proper Court, I should very probably have had no difficulty in revoking the leave or in returning the plaint to be presented to the proper Court. But it has been the uniform practice of this Court recognised in considered judgments of learned Judges not to return any plaint presented to and filed in this Court. In the event, therefore, of my revoking the leave the plaintiff would be certain to lose practically the whole of the said amount paid in by him as Court-fee in this Court. But even these considerations, vital though they are, are not sufficient to persuade me to refrain from making the order of revocation which, I have otherwise come to the conclusion, would be a just and proper order to make. But there are two further circumstances on a deep and anxious consideration of which I have felt constrained to come to the conclusion that it is not desirable to make such an order of revocation. The first is that even if I should revoke the leave the suit in this Court will not necessarily terminate. The plaintiff, however false or frivolous the suit may be, is entitled still to proceed with the present suit at any rate limited to the Dunmore House, the property situate within the jurisdiction of this Court. If in spite of the leave being revoked the plaintiff should elect to proceed with the suit, then the result would be that the defendant will be under a necessity to suffer not only all the inconveniences on the ground of which it is argued on his behalf that the case should not be allowed to be tried in this Court but also to face another suit with the same scope but only instituted in a different Court with respect to other properties. I am satisfied that the defendant cannot properly regard this as a convenience. No doubt as a defendant in the action he is entitled to put obstacles in the way of the plaintiff pursuing his claim whatever it may be and I conceive that the real object of the defendant in pressing the present application is mainly that, if successful the order revoking the leave may operate as a

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tactical move in the game of litigation and if perchance the plaintiff should find himself without any sufficient resource to pay once over again the Court-fee in another Court and that at a higher rate the *coup de grace* may come effectually to be so administered to the plaintiff's attempt altogether. I do not for a moment suggest that the defendant, more especially in such an action, is not entitled to have recourse to all available legal means of trying to nip it in the bud. But at the same time I am satisfied that a Court is entitled to take into consideration the consequences to one of the litigants of revoking the leave granted proving so disastrous and out of all proportion.

The last and the most overwhelming consideration which has weighed on my mind with regard to this question is the desirability, taking all circumstances into consideration, of such a suit as this being tried and disposed of, not by a Subordinate Judge in the mofussal, as in all probability it would have to be, if the leave granted should be revoked, but by this Court itself. The magnitude of the interest involved, the difficulty and importance of the questions that arise and the nature of the struggle in the litigation are to my mind such as would undoubtedly warrant this Court in the exercise of its Extraordinary Original Civil Jurisdiction to transfer the case, even if originally instituted in the mofussal, to this Court for trial and disposal.

I am aware that there has been no established practice with regard to the principle on which cases should be transferred by the High Court in its exercise of the Extraordinary Original Civil Jurisdiction from Courts in the district to itself. But at the same time I am equally aware that many Judges of this Court have for even more slender reasons ordered the transfers of cases.

On a careful and anxious consideration of all the circumstances and the nature of the present case I feel quite satisfied that whereas a trial of the action in this Court is likely to prove very reasonably short, it is bound, if tried elsewhere, to grow into enormous dimensions and occupy what I might justifiably characterise as an unconscionably long time. When the question is whether I should now make an order which might have the result of this litigation with all the pomp and circumstance of a zamindari suit protracted over years, I feel bound to take into consideration in the interests of both parties concerned, the possibility, nay the great probability of the litigation in this Court being confined within necessary and narrow limits and terminated also within a period much shorter than may at present be anticipated.

I have therefore after giving the matter my very careful and earnest consideration come to the conclusion that if this suit had been filed in the mofussal and an application had been made to me for its being transferred to this Court, in the exercise of the Extraordinary Original Civil Jurisdiction of this Court I should very probably have seen my way to make such an order. If so, it is clear that now that the suit has been instituted in this Court, I do not feel justified, though I am satisfied that the defendant may

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otherwise be entitled to such an order, in deciding that in the circumstances the case should be tried only in the District of Godavari.

The only grounds on which chiefly, if not solely I have been asked by the learned vakil for the defendant to revoke the leave granted were, that a large number of witnesses to be examined on behalf of the defendant with regard to issues of fact which are likely to arise for determination are residing only within the limits of Godavari District and that having regard to the desirability of the Court finally determining the issues of fact seeing the chief witnesses for itself, it is not desirable that this Court should be seized of the case with the necessary result of requiring all that evidence to be taken on commission; and secondly, that the conveniences of the defendant as a zamindar with his numerous agencies in or near the zamindari would be in favour of the trial being held within the District itself. I do not feel by any means persuaded that the latter ground is one, a consideration of which should really prompt the Court to give effect to it. As regards the former ground it is undoubtedly desirable that as much of the oral evidence especially in such a suit should be taken by the Judge deciding the suit. But on behalf of the defendant himself it has been intimated that there is just a possibility of no such evidence being required to be adduced in view of certain preliminary questions that arise and further even if it should turn out that the defendant is not willing or able to produce such witnesses before this Court, I am not at all sure whether, having regard to the importance and magnitude of the case, arrangements could not be made as contemplated in and permitted by the Letters Patent of this Court for the Judge of this Court hearing the case sitting for some time in some place in the district itself for the examination of all the local witnesses. But for the present purpose I am inclined to regard such a contingency as rather too remote. Though a great deal has been said about the convenience of the defendant, I do not feel satisfied whether it will not really in the end turn out to be even for his own convenience and advantage that the trial of the suit should be in this Court more especially having regard to the fact that the lawyers likely to be engaged in this litigation are or would be members of the Bar of this Court and that therefore the hearing of the action in this Court would really make for expeditious disposal.

I have thus come to the conclusion that though under other circumstances the defendant may, having regard to the merits of the case and the law bearing on the point, both of which I have already discussed, be entitled to an order of revocation of leave to sue as prayed for, still having regard to the nature of the present action and the peculiar circumstances of the case before me, it is not desirable that I should make such an order The application of the defendant is therefore refused. But as in my judgment it was not by any means an improper application to make, I direct that the taxed costs of the application be costs in the cause.

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[Against this order of the learned Judge the present appeal was preferred.]

S. Srinivasa Aiyangar, V. Radhakrishnayya, A. Krishnaswami Aiyar, P. Kameswara Rao and *S. Venkatesa Aiyangar* for appellant.

Nugent Grant instructed by *C. Rama Rao* and *V. C. Gopalaratnam* for respondent.

The judgment of the Court was delivered by

Wallace, J.

Wallace, J. :—This is an appeal against the order of Srinivasa Aiyangar, J., refusing to revoke an order giving leave to sue on the Original Side of this Court. The plaintiff is suing to recover from the defendant possession of certain zamindari property. All the property except a bungalow called "Dunmore House" is outside the jurisdiction of this Court. He filed his suit on the Original Side on what is stated to be the last day before it would be barred here by limitation. Leave to sue was asked for *ex parte* without notice to the defendant, and, in view of the urgency of the matter, was granted by the learned Judge. Later on the defendant put in an application to revoke the leave, principally on the ground that the inclusion of "Dunmore House" was specious and *mala fide*, being a mere device to give the High Court a fictitious jurisdiction in order to get round the bar of limitation, since the suit was already barred by time in the mufassal and could not have been entertained unless this Court was persuaded to entertain it. The learned Judge has refused to revoke his order and the defendant comes up here on appeal.

The learned Judge in his order says, "I cannot possibly hold the inclusion of the claim in respect of 'Dunmore House' as *bona fide*" and has "practically no doubt" that "Dunmore House" "has been included in the plaint merely for the purpose of making it appear that some portion of the land claimed was situate within the jurisdiction of this Court," and he holds that the present case is "undoubtedly a fit and proper case in which, ordinarily speaking, leave to institute the suit should not have been granted and therefore a proper case in which the leave granted *ex parte* should be revoked". But because of some special circumstances he refused to revoke his order, these circumstances being chiefly (*a*) concern for the plaintiff because he had paid a large Court-fee which he will lose as it has not been the practice of this Court to return a plaint, (*b*) concern for the defendant because he may, if the leave is revoked, be

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driven to face another suit in another Court, and (*c*) the desirability that the suit should not be disposed of by mufassal Subordinate Judge. It will be observed that these special circumstances have nothing to do with the question of jurisdiction or limitation. The first is an appeal *ad miseri cordiam*. The second is not put forward by the defendant himself and the third pre-supposes that the suit is maintainable, that is, is not barred by limitation in the mufassal Court, while the *ex parte* order was obtained on the footing that the suit would be barred by time in the mufassal Court.

However the main point argued before us is whether an appeal lies at all against such an order. An order refusing to revoke a grant *ex parte* of leave to sue is in essence an order granting after contest leave to sue. Now, if the plaintiff's suit was really on the date of presentation here barred by time in the mufassal, and if the *ex parte* leave to sue ought not, as the learned Judge holds, to have been given in the first instance, but if nevertheless the learned Judge has decided *finally*, even if he has decided wrongly, that he has jurisdiction to entertain the suit, then, plaintiff's suit being on a proper application of the law still-born the grant of leave to sue is giving life to a dead suit and inflicting on defendant an injury *prima facie* irreparable, unless an appeal lies.

As to whether an appeal does lie, the only direct authorities on this question are in *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub* and *Rohima Bye* v. *Hadjee Mahomed Hadjee Joosub* (1) where the Calcutta High Court held that an appeal lies from an order granting leave to the plaintiff to sue and in *Vaghoji* v. *Camaji* (2) where it was held that an appeal lay against an order on the Original Side dismissing an application to rescind a leave to sue granted. In the latter case it was held that the order then under appeal being on the question of whether the suit was one for land so as to come under cl. 12 of the Letters Patent, was decisive.

Without laying down any general proposition that a leave to sue is always a judgment under cl. 15 of the Letters Patent and therefore subject to appeal, we think that in any particular case the proper test as to whether the order is or is not a judgment has been laid down by the late Chief Justice Sir Arnold White in *Tuljaram Row* v. *Alagappa Chettiar* (3), a ruling which has been consistently adopted in this Court as laying down the

1. (1874) 13 Beng. L R 91. 2. (1904) I L R 29 B 249.
3. (1910) I L R 35 M 1 : 21 M L J 1 (F B).

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guiding principle. There at p. 7 he says, "The test seems to me to be not what is the form of the adjudication but what is its effect in a suit or proceeding in which it is made. If its effect whatever its form may be and whatever may be the nature of the application on which it is made is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect if it is not complied with is to put an end to the suit or proceeding I think the adjudication is a judgment within the meaning of the clause". In that view it appears to us that it cannot be maintained with reason that the grant of leave to sue is not a judgment within the meaning of cl. 15 of the Letters Patent, if the order has *finally* shut out the defendant from now pleading or being heard on the question that the suit should have been so dismissed on the point of jurisdiction. If this refusal to dismiss the suit is in effect a final judgment against a dismissal of the suit on the ground of jurisdiction, a judgment which cannot be attacked in appeal because the matter of jurisdiction will not *ex hypothesi* be made a matter of issue in the suit, then it will in our view be a judgment within the scope of the test set out in *Tuljaram Row* v. *Alagappa Chettiar* (3). But if the question of the jurisdiction of this Court to entertain the suit is still open for decision at the trial of the suit, then in our view the order passed is not of a final nature and would not be a judgment. Mr. Grant for the plaintiff stated before us that the plaintiff's position was that the question of jurisdiction is still open for decision on an appropriate issue in the suit. The defendant's learned vakil was doubtful if that was so and whether the order granting leave to sue did not finally dispose of the question of jurisdiction. That we think is not necessarily so. A Court has always jurisdiction to try on an appropriate issue in a suit whether it has jurisdiction or not to try the suit; that is, to set in motion the process by which the various points at issue between the parties including that of jurisdiction fall to be decided.

In the present case the leave of the Court has been obtained under cl. 12 of the Letters Patent on the footing that part of the property sued for is situated within the local limits of the original jurisdiction of this Court. But, if subsequently on a full trial on the point it appears that the inclusion of Dunmore House was not due to a *bona fide* claim to that house but was

3. (1910) I L R 35 M 1 : 21 M L J 1 (F B).

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merely a device by which the law of limitation might be evaded, the Court has power still to give the proper relief. It appears to us therefore that the order under appeal is not a judgment within cl. 15 and an appeal does not therefore lie. It would be well if in the trial of the suit this question of jurisdiction be tried and decided as a preliminary issue. We therefore dismiss the appeal but make no order as to costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER AND MR. JUSTICE MADHAVAN NAIR.

Dharmala Kamayya (died) and others ... *Appellants* (Appellant in S. A. No. 1165 of 1921 on the file of the High Court—Plaintiff and his L. Rs.)*

v.

Bhimarasetti Mahalakshmi . . *Respondent (2nd Respondent in do.—3rd Defendant).*

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Limitation Act, Arts. 142 and 144—Decree for possession—Symbolical delivery of possession as opposed to actual delivery—Subsequent suit for possession within 12 years from the date of symbolical delivery—If barred.

The plaintiff obtained a decree for possession and applied for delivery. He obtained only symbolical possession and not actual possession. The defendant was in possession both before and after the delivery for a total period of about 20 years. Plaintiff waited for nearly 12 years from the date of the symbolical delivery and then brought a suit against the same defendant for recovery of possession.

Held, that the suit was not barred by limitation, as the symbolical delivery gave rise to a fresh period of limitation as against the judgment-debtor who was not entitled to deny that he was dispossessed, even though he was not actually evicted.

Case-law on the subject reviewed.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Devadoss dated the 1st September, 1924 and passed in S. A. No. 1165 of 1921, preferred to the High Court against the decree of the District Court of Vizagapatam in Appeal Suit No. 290 of 1918, preferred against the decree of the Court of the Additional District Munsif of Vizagapatam in O. S. No. 214 of 1917.

B. Jagannadha Doss for appellants.

B. Satyanarayana for respondent.

* L P A No. 154 of 1924. 4th March, 1927.

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The Court delivered the following

JUDGMENT :—The plaintiff obtained a decree for possession of certain land. In execution he applied for delivery of possession under O. 21, R. 35 and delivery was ordered. The finding is that what was effected was no more than a formal delivery of possession. He waited for nearly 12 years after that and then sued again. The question for decision—the defendant having been in possession both before and after the delivery for a total period of about 20 years—is whether the suit is barred by limitation. The District Munsif decreed the suit, but the District Judge held that it was time-barred, a conclusion in which Devadoss, J., concurred in second appeal. He dissented from *Govind* v. *Venkata Sastrulu* (1) and followed *Govindasami Pillai* v. *Pethaperumal Chetty* (2), which, he considered, was binding on him and certain rulings of the Bombay and Allahabad High Courts. The effect of these decisions is this: that, in cases where a decree-holder is bound to apply for actual as opposed to symbolical possession, but obtains only the latter, the delivery of possession is a nullity and does not give rise to a fresh period of limitation.

Authority on the question is divided. The High Court of Calcutta has invariably taken a view directly opposed to that of the two Courts above referred to. And so has this High Court since the ruling reported in *Kocherlakota Venkatakrishna Row* v. *Vadrevu Venkappa* (3) until a contrary opinion was expressed *obiter* in *Govindasami Pillai* v. *Pethaperumal Chetty* (2). The controversy would seem to have been concluded by a ruling of the Privy Council, *Thakur Sri Radha Krishna* v. *Ram Bahadur and others* (4) which approved *Juggobundhu Mukerji* v. *Ram Chunder Bysack* (5). It is no doubt true that both of these were cases where the only delivery to which the decree-holders were entitled was symbolical, but their Lordships of the Privy Council laid down a rule of general application to the effect that

"symbolical possession availed to dispossess the defendants sufficiently, because they were parties to the proceedings in which it was ordered and given".

The Bombay High Court considered this rule in *Mahadevappa Dundappa* v. *Bhima Doddappa* (6) and expressed the opinion that the view previously taken by that Court might,

1. (1907) 17 M L J 598.
2. (1917) 44 I C 839.
3. (1903) I L R 27 M 262.
4. (1917) 34 M L J 97 (P C).
5. (1880) I L R 5 C 584 (F B).
6. (1921) I L R 46 B 710.

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when the occasion arose, have to be reconsidered. In *Jobeda Khatun* v. *Tulsi* (7) the rule laid down by the Privy Council was re-stated and it was followed by Odgers, J. in *Ranganatha Aiyar* v. *Srinivasa Aiyangar* (8): In *Maharaja Pratap Udai Nath Sahi Deo* v. *Bhaiain Sunderbans Koer* (9) Adami, J. of the Patna High Court followed the Calcutta and Madras decisions. Daniels, J. of the Allahabad High Court in *Harpal Kurmi* v. *Mohan Kurmi* (10) held that in a case, where the warrant

"purported to give actual possession, which was the appropriate mode of relief though in the sequel it proved that the procedure adopted was not effective,"

there was actual delivery, which was sufficient to interrupt adverse possession. He remarked:

"It would be destructive of all respect for law and authority of the Court if it were held that in such cases (*i. e.*, cases in which the judgment-debtor stops away at the time of delivery and quietly resumes possession later) the judgment-debtor can treat the delivery of possession as a nullity and claim to be in adverse possession from the date of his original entry."

Only one other case need be referred to *Harbhagwan* v. *Taja* (11) in which Jai Lal, J. held that the delivery of symbolical possession

"even erroneously amounts to delivery of actual possession so far as the judgment-debtor and his representatives are concerned".

He added

"It is obvious that a person who is a party to certain legal proceedings is not entitled to question the legality of the procedure except in the manner authorised by law and that is by appeal—if he allows wrong procedure to be followed without effective protest he must be deemed to have acquiesced in it and therefore to be bound by it. The general principle of estoppel similar to *res judicata* will apply to a case like this".

It is clear that the balance of authority is overwhelmingly in favour of the view that, in a case like this, a judgment-debtor, who is a party to the execution proceedings and is bound by the decree, is not entitled to deny that he was dispossessed, even though he was not actually evicted. We think that the rule laid down by the Privy Council is so worded as to be of general application and that we must follow it. In the result, the L. P. Appeal must be allowed. The decree of the Munsif is restored with costs throughout.

N. S. *Appeal allowed.*

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7. (1922) 36 C L J 472. 8. (1925) 49 M L J 656.
9. (1922) 71 I C 999. 10. A I R 1924 A 844.
11. A I R 1926 Lah 35

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Divyadaru Chendrasekharalingam being minor by next friend Divyadaru Basavamma ... *Appellant* in S. A. Nos.* 1232 *and* 1233 *of* 1924 (*2nd plaintiff*)

v.

Arigapudi Naghabhushanam & another ... *Respondents* (*Defendants*).

Chendrasekharalingam v. Naghabhushanam.

Transfer of Property Act, S. 6 (*e*)—*Past mesne profits—Claim to—Transfer of—Validity—Assignment valid of such claim—Assignor's right to sue for such profits notwithstanding.*

A transfer of a claim to past mesne profits is invalid under S. 6 (*e*) of the Transfer of Property Act.

A person, who was owner of the property at the time it was trespassed upon and to whom the trespasser became liable for its mesne profits can, even after a valid assignment of the claim to such profits, maintain a suit for the recovery of the same. Such a suit by him may be for the benefit of the assignee, and he may be made to hand over the amount when collected to the assignee.

Second appeals against the decrees of the Court of the Additional Subordinate Judge of Masulipatam in Appeal Suits Nos. 46 and 47 of 1923 (A. S. Nos. 160 and 161 of 1923, District Court, Kistna) preferred against the decrees of the Court of the District Munsif of Gudivada in O. S. Nos. 414 and 413 of 1921 respectively.

K. Kameswara Rao for appellant.

P. Satyanarayana Rao for respondents.

The Court delivered the following

JUDGMENT :—These Second Appeals are connected with S. A. No. 1179 which was disposed of yesterday. The original plaintiff in these Second Appeals whose legal representative is now the appellant was the reversioner who sold the property to the plaintiff in the other suit. The suits out of which these Second Appeals arise are filed to recover mesne profits for faslis 1328 and 1329. The profits for these faslis were also intended to be transferred by the sale deed in favour of the vendee in the other case. That is Ex. A in that Second Appeal. But the plaintiff in the other Second Appeal did not sue for these profits apparently on the ground that the transfer is void

* S. A. Nos. 1232 and 1233 of 1924. 25th February, 1927.

Chendrasekharalingam v. Naghabhushanam.

according to the decision in *Seetamma* v. *Venkataramanayya*(1) and the vendor and the vendee seem to have agreed that the vendor himself should sue for these profits. Accordingly the actual reversioner brought these suits to recover the mesne profits. The District Munsif decided against the plaintiff saying:

"The plaintiff has not come into Court with clean hands. It would not be equitable to allow the plaintiff to get at profits in this indirect fashion."

I do not understand these sentences. On appeal the Subordinate Judge held relying on *Venkatarama Aiyar* v. *Ramaswami Aiyar* (2) that the transfer was valid and therefore the vendee under Ex. A ought to have sued for mesne profits and not the present plaintiff and accordingly dismissed these suits though he decreed the other suit. The plaintiff files these Second Appeals.

The decision in *Seetamma* v. *Venkataramanayya* (1) has been followed in *Muthu Hengsu* v. *Netravathi Naiksavi* (3) in which the Judges also rely upon *Defries* v. *Milne* (4). The same view was taken in *Mohesh Lal* v. *Mohant Bawan Das* (5) and recently again by Greaves and Cumming, JJ., in *Sukhamoyee Biswas* v. *Manoranjan Chaudhury* (6). The Patna High Court also took the same view in *Jai Narayan Pande* v. *Kishun Dutta Misra* (7). The point did not arise in *Venkatarama Aiyar* v. *Ramaswami Aiyar* (2) where what was transferred was a decree in regard to past mesne profits. But, though this question did not arise there, both the learned Judges made a passing reference to it. Sadasiva Aiyar, J., said that these decisions are the result of an unnecessarily close adherence to the development of law of torts in English Courts. Seshagiri Aiyar, J., says that when he decided the case in *Muthu Hengsu* v. *Netravathi Naiksavi* (3) the fact, that the sale deed covered the right to mesne profits, was not brought to his notice at the time of the hearing and then he adds:

"If the decision to which I was a party is to be understood as laying down that even in cases of actual transfer of mesne profits as subsidiary to the enjoyment of the property the right cannot be enforced, I am not prepared to stand by it."

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1. (1913) I L R 38 M 308 : 25 M L J 410.
2. (1920) I L R 44 M 539 : 40 M L J 204. 3. (1920) 12 L W 44.
4. (1913) 1 Ch 98. 5. (1883) I L R 9 C 961 at 965 (P C).
6. (1925) 89 I C 827. 7. (1924) I L R 3 Pat 575.

Chendra-sekhara-lingam v. Nagha-bhushanam.

If the learned Judge meant to say that the right to past profits is subsidiary to the enjoyment of the property, I am not prepared to agree with him. S. 8 of the Transfer of Property Act says only the rents and profits accruing after the sale must be regarded as included in the legal incidents of the property. But as to past profits that accrued due prior to sale it cannot be said that they are subsidiary to the enjoyment of the property. It cannot be said that to make a sale operative and effective, the right to collect past profits must also be conveyed to the vendee. This is also the view of Das, J., in *Jai Narayan Pande* v. *Kishun Dutta Misra* (7). I am therefore inclined not to share the doubts of Seshagiri Aiyar, J., in *Venkatarama Aiyar* v. *Ramaswami Aiyar* (2), and I am of the opinion that the earlier decision to which he was a party, namely, *Muthu Hengsu* v. *Netravathi Naiksavi* (3) is rightly decided. There is a singularly uniform course of decisions on this point in all the Courts and as I do not feel any doubt on the matter I do not see why I should depart from the decision in *Seetamma* v. *Venkataramanayya* (1) on account of the doubts in the nature of *obiter dicta* expressed in *Venkatarama Aiyar* v. *Ramaswami Aiyar* (2). I may point out that Sadasiva Aiyar, J., himself had followed in *Govindasami Pillai* v. *Ramaswami Aiyar* (8) the decision in *Seetamma* v. *Venkataramanayya* (1). Following these decisions I think the plaintiff in these cases is entitled to a decree for the mesne profits prayed for.

It having been found that the defendants are not entitled to the land, they are certainly liable to pay profits to the present plaintiff who was the owner at the time when the defendant trespassed on the lands. The defendants having incurred an obligation in favour of the present plaintiff, the fact that the plaintiff's right was transferred to some transferee ought not to make the obligation any the less. It may be that in such a case the defendants ought to be protected from a double action. Of that there is no fear in the present litigation. It seems to me that even if the assignment is valid, the right of action originally residing in the assignor has not ceased. It is true S. 130 of the Transfer of Property Act says that where an actionable claim is transferred all the rights and remedies of the transferor are transferred. I do not deny this.

1. (1913) I L R 38 M 308 : 25 M L J 410.
2. (1920) I L R 44 M 539 : 40 M L J 204. 3. (1920) 12 L W 44.
7. (1924) I L R 3 Pat 575. 8. (1916) 30 M L J 492.

Chendrasekharalingam v. Naghabhushanam.

All that I say is that the transferor may maintain the action and afterwards hand over the amount when collected to the transferee. The whole of Chap. VIII of the Transfer of Property Act is intended to enable transferees of actionable claims to maintain actions on the assignments and to get rid of the difficulties in the English Law where, for some time, assignees could not maintain an action at all and afterwards they were allowed to maintain action in the name of the assignor. But I do not think this chapter is intended to lay down that the transferor himself cannot maintain an action for the benefit of the transferee. This is the alternative ground on which I should think these second appeals ought to be allowed even if the assignment is valid.

The result is these second appeals should be allowed and the plaintiff will be given a decree in these two suits at the rate found by the Subordinate Judge in para. 7 of his judgment with interest at 6 per cent. from the date of accrual up to date of decree and future interest up to payment. The plaintiff will be entitled to costs throughout.

A. S. V. ——— *Appeals allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT :—LORD SINHA, LORD BLANESBURGH, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Saiyid Mehdi Ali Khan ... *Appellant* (Plaintiff)*

v.

Chaudhri Ghanshiam Singh ... *Respondent (Defendant).*

P. C.

Saiyid Mehdi Ali Khan v. Chaudhri Ghanshiam Singh.

Civil Procedure Code, 1908, O. 23, R. 3—Compromise—Party cannot recede from it.

Where a compromise completely disposes of a suit and the terms agreed to are such as to be susceptible of specific performance being granted, no party to such compromise can refuse to be bound by its terms and to escape from his obligations thereunder. The Court is competent, under O. 23, R. 3, Civil Procedure Code, 1908, to record the compromise and to pass a decree in accordance therewith.

Judgment of the High Court affirmed.

Consolidated Appeals (Nos. 18 and 19 of 1926) from a judgment and decree of the High Court, Allahabad (Piggott and Walsh, JJ.), dated the 28th May, 1923, which reversed an order of the Subordinate Judge of Muzaffarnagar, dated the 1st February, 1922, dismissing an application made under O. 23, R. 3, Civil Procedure Code, 1908, for filing an agreement of compromise of a suit.

* P C Appeals Nos. 18 and 19 of 1926. 15th July, 1927.

P. C.

Saiyid Mehdi Ali Khan v. Chaudhri Ghanshiam Singh.

The material facts are set out in their Lordships' judgment. The memorandum of compromise, dated the 2nd November, 1921, the construction whereof was the principal question argued before the Judicial Committee, was as follows:—

"PRESENT :—

Re Estate

Saiyid Mehdi Ali Khan
Chaudhri Ghanshiam Singh.

Hon'ble Lala Sukhbir Singh and Rai Sahib Lala Jagadish Prasad were invited to see whether a settlement could be reached between these two 'raises'.

They met on 2nd November, and there were also present Lala Dhum Singh and Lala Hoshyar Singh.

Saiyid Mehdi Ali Khan is ready to take 15 biswas of mauza Barsu in lieu of all his dues. His 15 biswas will be free of all encumbrances, *i e.*, the charge of Rs. 20,000 will be paid by R. B. Ghanshiam Singh to Lala Gokal Chand's Estate. R.B.Chaudhri Ghanshiam Singh is willing to sell only 13¾ biswas, *i. e.*, 2|3 of whole village to pay off all Saiyid Mehdi Ali Khan's dues and possession to be given at once before Kharif 1329 Fasli by partition by Hon'ble Lala Sukhbir Singh and Rai Sahib Lala Jagdish Prasad through Collector. Till partition completed one or both of these arbitrators will arrange for collection.

The Hon'ble Lala Sukhbir Singh and Rai Sahib decided with parties' consent that Chaudhri Ghanshiam Singh sells 15 biswas to Saiyid Mehdi Ali Khan in full discharge of dues and Saiyid Mehdi Ali Khan bears expenses of sale and also pays Rs. 5,000 to Chaudhri Ghanshiam Singh for part payment to Lala Gokal Chand, and Chaudhri Ghanshiam Singh will be responsible for seeing that the 15 biswas transferred are free of this charge.

The adopted son Chaudhri Bharat Singh will release this fifteen biswas from his claim in the Civil Court and will witness the sale-deed. The sale-deed will be written and signed by parties and witnesses and will be registered till the 11th November, 1921.

An agreement will be drawn up and registered by both parties that both the arbitrators will draw up partition lots before 31st December, 1921, and parties will agree to lots drawn up.

In the sale-deed it will be written that Chaudhri Ghanshiam Singh will be responsible for the money due to Gokal Chand and if the heirs of Gokal Chand ever realize any money from Saiyid Mehdi Ali Khan's fifteen biswas, Saiyid Mehdi Ali Khan can recover from any property of Chaudhri Ghanshiam Singh. The application of Chaudhri Bharat Singh will be signed by Chaudhri Ghanshiam Singh, Chaudhri Bharat Singh and Saiyid Mehdi Ali Khan and will be verified by the Collector as Collector and forwarded to the Civil Court.

All above was read out and assented to by parties.

(Sd.) P. W. MARSH.
" SUKHBIR SINGH
" MEHDI ALI KHAN
" JAGDISH PRASAD
" GHANSHIAM SINGH

2nd November, 1921."

P. C.

Saiyid Mehdi Ali Khan v. Chaudhri Ghanshiam Singh.

De Gruyther, K. C., *Wallach* and Dr. T.C.K. *Kurup* for appellant.

Dunne, K. C., and K. V. L. *Narasimham* for respondent.

15th July, 1927. The Judgment of their Lordships was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—The short question upon this appeal was whether the learned Judges of the High Court of Judicature at Allahabad were justified in ordering, as they did on the 28th May, 1923, that a written compromise of all questions in the suit as between the appellant and the two respondents should be filed and proceeded with. In making this order the High Court differed from the Subordinate Judge at Muzaffarnagar, who, on the 1st February, 1922, had refused to pass such a decree.

Many questions were canvassed in the Courts in India. The issue, however, as presented to the Board, had become a narrow one. The facts on which it depends lie in a small compass.

The respondent, Chaudhri Ghanshiam Singh, is a Hindu of position. Amongst the properties with which he had apparently dealt as his own were two villages—Mauza Dudhli and Mauza Barsu. These he had purported to mortgage with possession to the appellant, Saiyid Mehdi Ali Khan. He had also granted a mortgage over Mauza Barsu to one Lala Gokal Chand. It is not necessary for present purposes to detail the mortgages over other property granted by Ghanshiam to other creditors, and particularised in the plaint in this suit. It suffices to say that as a result of his borrowing transactions Ghanshiam had, in the early part of 1920, become so gravely embarrassed that in May of that year the appellant instituted against him in the Court of the Subordinate Judge of Meerut a suit to enforce his security over the two villages named. What defences were or would have been raised therein by Ghanshiam their Lordships do not know, because further progress apparently ceased as the result of the institution of this suit by the respondent, Kunwar Bharat Singh, in the circumstances now to be stated.

Kunwar Bharat Singh claims to be the adopted son of Ghanshiam, and as member of the joint Hindu family so constituted to be joint with his adoptive father in, *inter alia*, the two villages above referred to. In that character he applied in Saiyid Mehdi Ali's suit for leave to intervene, alleging that the

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Lord Blanesburgh.

mortgages of family properties made by Ghanshiam were not made for legal necessity and were not binding upon him. His position as adopted son of Ghanshiam was at once challenged by Saiyid Mehdi Ali as well as by Ghanshiam's other mortgage creditors, and in the result his application for leave to intervene in the suit was refused, and he was informed that his rights must be asserted in separate proceedings.

Thus it was that the present suit was commenced by Bharat Singh on the 20th August, 1920, and since its institution no more has apparently been heard of the appellant's earlier suit. This is not surprising when the wide scope of the present suit is regarded. To it all the mortgagees to whom Ghanshiam had purported to grant security and, in particular, Saiyid Mehdi Ali Khan and Gokal Chand are made defendants. Ghanshiam also is joined as a defendant. By his plaint the plaintiff, Kunwar Bharat Singh, seeks a declaration as to his adoption by Ghanshiam, and he claims that none of the mortgages of family property made by Ghanshiam were made for legal necessity and that they are none of them binding on the family. On the 23rd December, 1920, a written statement by the present appellant, Saiyid Mehdi Ali, was delivered, in which the allegations of the plaintiff are challenged *seriatim* and the appellant sets up that there is due to him in respect of his mortgage upon Mauza Barsu a sum of Rs. 1,00,250, of which full particulars are given in the pleading. It is clear to their Lordships on a perusal of this written statement that it was the purpose, and the laudable purpose, of the appellant to have determined in the present proceedings all questions as to his mortgage claims whether as against Bharat Singh or as against Ghanshiam Singh, and it is these questions which are the subject of the compromise now in question.

That compromise was brought about by the good offices of Mr. Marsh, the Collector of Muzaffarnagar, and is embodied in a memorandum dated the 2nd November, 1921, signed by the appellant and Ghanshiam, as well as by Mr. Marsh and two other gentlemen friends of the parties who had also intervened to bring about the settlement. The memorandum is fully set forth in the judgment of the High Court, and their Lordships do not consider it necessary to have it again printed. Although it is not signed by Bharat Singh, their Lordships, like the High Court, are satisfied that it was made by Ghanshiam Singh as well on Bharat Singh's behalf as on his own, and with his full

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Saiyid Mehdi Ali Khan v. Chaudhri Ghanshiam Singh.

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authority. In all other respects the terms of the compromise are quite clear. The appellant in effect is to have from both father and son a clean conveyance of 15 biswas of Mauza Barsu in full satisfaction of all his mortgage claims; he is also to pay Rs. 5,000 for part satisfaction of Lala Gokal Chand's mortgage on the same mauza, which is to be so far extinguished that the 15 biswas to be transferred to the appellant may be transferred free of that charge.

It would appear that shortly after he had entered into this compromise the appellant repented of it and refused to be bound by its terms. His objections to it before the learned Subordinate Judge were partly technical, partly substantial. The plaintiff, Bharat Singh, was no party to it: it did not relate to the suit: it was fraudulent: it had not been performed by Ghanshiam. The learned Subordinate Judge was of opinion that no fraud was established and that the breach was that of the appellant and not that of Ghanshiam; but he held that the compromise could not be recorded under O.23, R. 3, because, in his view, the son was no party to it and had only subsequently elected to be bound by it because it was to his advantage so to be.

From this refusal the present respondents appealed to the High Court. The learned Judges of that Court, not being satisfied that the allegation of fraud made by the appellant had, on full materials, been disposed of by the learned Subordinate Judge, referred that issue again to him, and after a further full hearing, and, as the Judges of the High Court say, for overwhelming reasons, that learned Judge found again that there was no false or fraudulent representation whatever. For the rest, the learned Judges of the High Court were of opinion that the father had full authority to act on behalf of the son, and that thoughout the son was bound by the terms of the compromise. They accordingly directed the compromise to be filed and they prescribed the terms upon which the transaction was to be completed. From that order the present appeal was brought by Saiyid Mehdi Ali Khan.

Before their Lordships the question mainly argued was that the compromise was not a complete and final settlement of the suit so far as the appellant was concerned: that its terms were not of a character of which specific performance could be granted, and, less strongly, that it was not, *ab initio,* binding upon the son, the respondent Kunwar Bharat.

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Saiyid Mehdi Ali Khan v. Chaudhri Ghanshiam Singh.

Lord Blanesburgh.

Their Lordships have been unable to accept any of these contentions. They are in full accord with the learned Judges of the High Court as to the authority of Ghanshiam to bind Kunwar Bharat to the compromise in respect of his interest in the property, and in their judgment the terms agreed to are such as to be susceptible in every detail to an effective order in the nature of specific performance against any party to the compromise who seeks to escape from his obligations thereunder. In their Lordships' judgment the terms agreed to entirely dispose of the suit so far as the appellant's interests therein are concerned.

To the details of the order of the High Court no separate objection was raised by the appellant. In these circumstances, their Lordships, as they have already informed the parties, are of opinion that the order of the High Court cannot be disturbed, and they think for the reasons which they have now given that this appeal from that order should be dismissed, and they will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

Solicitors for appellant : *Douglas, Grant & Dold.*

Solicitor for respondent : *H. S. L. Polak.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—LORD SINHA, LORD BLANESBURGH, LORD SALVESEN, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Ramgowda Annagowda Patil and others ... *Appellants** *(Plaintiffs)*

v.

Bhausaheb and others ... *Respondents (Defendants).*

P. C.

Annagowda Patil v. Bhausaheb.

Hindu Law—Reversioner assenting to widow's alienation, when precluded from questioning it.

An alienation by a Hindu widow in excess of her powers is not altogether void but only voidable by the reversioners, who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding.

Tayava, a Hindu widow, alienated most of her husband's (Akkagouda's) properties in 1868 by three deeds. By one of these she made a gift of certain of those properties to her brother Basappa, by another she sold half of certain other lands to Annagouda (who was the nearest kinsman on the husband's side), and by the third she sold the other half of those

*P. C. Appeal No. 42 of 1925. 11th July, 1927.

properties to her son-in-law Shivgouda. These three deeds were all executed and registered on the same day, and each of these alienations was assented to by the other alienees. When the succession opened out on the death of the widow Tayava in 1912, Annagouda was under the Hindu Law the nearest heir of Akkagouda (Tayava's husband). Annagouda, who survived the widow by nearly six years, did not in his lifetime seek to set aside the alienations in favour of Basappa and Shivgouda; but after his (Annagouda's) death in 1918, his son and grandsons instituted the present suit to recover those properties on the ground that the alienations thereof by the widow were not valid.

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Annagowda Patil
v.
Bhausaheb.

Held, (affirming the High Court), that both the gift to Basappa and the sale to Shivgouda by Tayava were binding on the plaintiffs. The three deeds of alienations executed by Tayava were part and parcel of one transaction and were inseparably connected together, and Annagouda himself being a party to and benefiting by the transaction evidenced thereby was precluded from questioning any part of it, and the plaintiffs claiming under or through him had no better title to succeed in the suit than Annagouda had. "The transactions which were effected by Tayava with the consent of Annagouda and Shivgouda were evidently pre-arranged as a proper disposition of Akkagouda's property between these parties, and those transactions must be considered as a whole, and since Annagouda received considerable advantage from giving his consent to Tayava's alienations, it would be most inequitable if his (Annagouda's) descendants, while retaining that advantage, should be allowed to set aside the other alienations."

Quaere : Whether the contingent interest of a remote Hindu reversioner, being a mere *spes successionis,* could be validly sold by him, and whether an agreement to sell such interest would be void in law.

Judgment of the High Court upheld.

Appeal (No. 42 of 1925) from a judgment and decree of the High Court, Bombay (Sir Norman MacLeod, Chief Justice and Mr. Justice Crump), dated the 19th March, 1923, which modified a judgment of the Subordinate Judge of Belgaum, dated the 23rd May, 1921.

The material facts are set out in the judgment of the Judicial Committee. The case in the Court below is reported in 25 Bom. L. R. 813.

Raikes and *Nilkant Atmaram* for appellants.

Lowndes, K. C., and *Wallach* for respondents.

11th July, 1927. The Judgment of their Lordships was delivered by

Lord Sinha.

LORD SINHA.—This is an appeal by the plaintiffs from a decree of the High Court of Bombay which modified a decree of the Subordinate Judge of Belgaum made in Suit No. 203 of 1919.

That suit was instituted to recover possession of certain houses and lands from the defendants.

P. C.

Annagowda Patil v. Bhausaheb.

Lord Sinha.

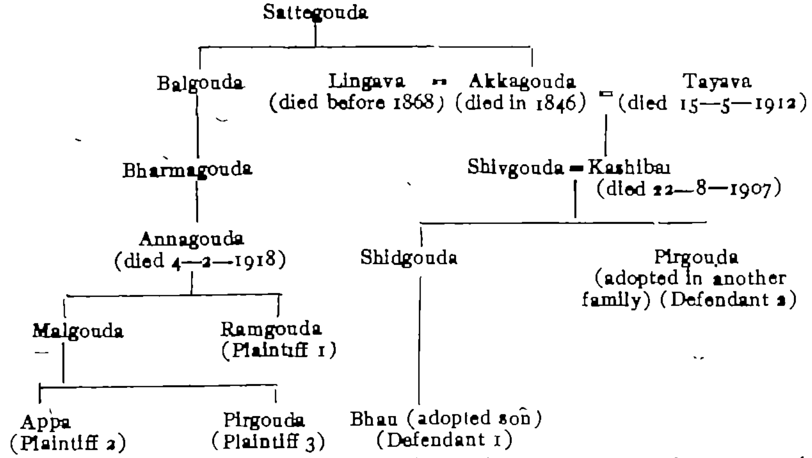
The properties in suit originally belonged to one Akkagouda who died in 1846, leaving two widows, Lingava and Tayava, and a daughter Kashibai, who was married to one Shivgouda and had a son Shidgouda.

Lingava died before 1868, but her co-widow lived till 1912, thus surviving her husband for 66 years.

Kashibai, the daughter, died in 1907, a few days after the death of her husband Shivgouda. Shidgouda, her eldest son, died in 1907, leaving an adopted son named Bhau (Defendant No. 1).

Kashibai had a second son, Pirgouda (Defendant No. 2) who, however, had been given in adoption to another family some years before Kashibai's death.

The pedigree of the family is as follows:—



It is no longer in dispute that when the succession opened out on the death of Tayava in 1912, Annagouda was under the Hindu Law the nearest heir of Akkagouda, in preference to Bhau (Defendant No. 1) and Pirgouda (Defendant No. 2).

Tayava had alienated most of her husband's properties in 1868 by and under three deeds. By one of these she made a gift of certain of those properties to her brother Basappa; by another she purported to sell half of certain other lands to Annagouda himself for Rs. 2,000, and by the third she sold the other half of those properties to her son-in-law Shivgouda. There was only one small property left unalienated.

These three deeds were all executed and registered on the same day. The deed of gift in favour of Basappa was attested by Annagouda and Shivgouda; the deed of sale in favour of Shivgouda was attested by Annagouda and Basappa; and the sale

deed in favour of Annagouda was attested by Basappa and Shivgouda. And the widow as executant was identified before the Registrar in respect of all three deeds by Annagouda.

The latter subsequently in 1882 sold the properties purchased by him as aforesaid for Rs. 3,000. The properties purchased by Shivgouda remained in his possession till his death and afterwards of his grandson and son (Defendants 1 and 2) and their tenant Defendant No. 3. Basappa's share passed by purchase to Defendants 4 to 7.

Annagouda, who survived the widow by nearly 6 years, did not in his lifetime seek to set aside the alienations in favour of Shivgouda and Basappa; but after his death in 1918, his son and grandsons instituted the present suit against all the defendants above named to recover those properties on the ground that the alienations thereof by the widow were not valid.

It is admitted that Annagouda became entitled to the succession in 1912 and that the plaintiffs claim under or through him and therefore have no better title to succeed in this suit than Annagouda had.

On the written statements filed by the defendants, issues were raised, of which the two material ones are:—

1. Are the plaintiffs estopped from bringing this suit; and
2. Do the defendants prove that the transactions of gift (to Basappa) and sale (to Shivgouda) are legal and valid and binding on the plaintiffs.

The Trial Court found in favour of the plaintiffs on both issues and gave them a decree.

The High Court held that no question of estoppel arose in the case; but on the 2nd issue, held that both the gift to Basappa and the sale to Shivgouda by Tayava were binding on the plaintiffs, who therefore were entitled to recover in the suit only the small property which was not included in any of the three documents by her in 1868.

The grounds of their judgment may best be stated in their own words:—

"The transactions which were effected by Tayava with the consent of Annagouda and Shivgouda were evidently prearranged as a proper disposition of Akkagouda's property between these parties, and those transactions must be considered as a whole, and since Annagouda received considerable advantage from giving his consent to Tayava's alienations, it would be most inequitable if his descendants, while retaining that advantage, should be allowed to set aside the other alienations."

P. C.
Annagowda Patil v. Bhausaheb.
Lord Sinha.

It was contended before their Lordships on behalf of the appellants that the decision of the High Court was erroneous because—

1. The attestation by Annagouda of (1) the deed of gift to Basappa, and (2) the deed of sale to Shivgouda was no evidence of his consent to either of those transactions.

2. The deed of gift in favour of Basappa was admittedly not supported by legal necessity and no consent of reversioners, near or remote, could give it validity.

3. That even if Annagouda consented, such consent would not give validity to the sale to Shivgouda, as Annagouda was not the nearest reversioner at the time, inasmuch as the daughter Kashibai and her son Pirgouda were then alive and were nearer in succession.

4. That the sale to Annagouda himself did not estop him from questioning either the gift to Basappa or the sale to Shivgouda, as the transactions were separate and in no way interdependent, and that there was no such equity in favour of the defendants as the High Court assumed.

Their Lordships consider that the decision of this case depends upon how far the three documents can be taken as separate and independent, or so connected as to form one transaction

The long lapse of time between the execution of the deeds and the institution of the suit has rendered it impossible to prove what actually occurred between the parties on that occasion. There is not sufficiently definite evidence to come to a conclusion as to how far any of those properties were validly encumbered or what was done with the purchase money alleged to have passed on the two deeds of sale.

But the parties to the documents included, or after so great a lapse of time may be presumed in a very real sense to have included, all persons who had any actual or possible interest in the properties, viz., the widow herself, her brother, who was a natural object of her affection and bounty, her son-in-law, who was the natural protector of the interests of her daughter and grandson, and the nearest kinsman on the husband's side and the only person from whom any opposition might be apprehended with regard to dealings by the widow concerning her husband's estate.

Their Lordships conclude that all the circumstances strongly point to the three documents being part and parcel of one transaction by which a disposition was made of Akkagouda's estate,

P. C.

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Lord Sinha.

such as was likely to prevent disputes in the future and therefore in the best interests of all the parties.

The three deeds appear thus to be inseparably connected together and in that view Annagouda not only consented to the sale to Shivgouda and the gift to Basappa but these dispositions formed parts of the same transaction by which he himself acquired a part of the estate.

It was argued that Annagouda's contingent interest as a remote reversioner could not be validly sold by him, as it was a mere *spes successionis,* and an agreement to sell such interest would also be void in law. It is not necessary to consider that question, because he did not in fact either sell or agree to sell his reversionary interest. It is settled law that an alienation by a widow in excess of her powers is not altogether void but only voidable by the reversioners, who may either singly or as a body be precluded from exercising their right to avoid it either by express ratification or by acts which treat it as valid or binding.

If some person other than Annagouda had been at the death of Tayava the nearest heir of her husband, it might have been open to him to question all or any of the 3 deeds, but Annagouda himself being a party to and benefiting by the transaction evidenced thereby was precluded from questioning any part of it. Nor is it other than a most notable circumstance that he did not, after Tayava's death, essay to do so.

For these reasons their Lordships agree with the conclusion arrived at by the High Court and would humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Ranken, Ford & Chester.*

K. J. R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE BEASLEY.

C. Govindarajulu Naidu ... *Plaintiff**

v.

The Secretary of State for India in Council . . *Defendant.*

Govindarajulu Naidu v. The Secretary of State for India.

Letters Patent (Madras), cl. 12—Smuggled articles—Seizure and confiscation of, by Customs Officer outside Madras—Order of Collector of Customs affirming act of District Officer and directing sale of articles—

*C. S. No. 324 of 1925. 19th October, 1926.

Govindarajulu Naidu v. The Secretary of State for India.

Trover against Secretary of State by owner of goods—Action of—Maintainability on Original Side of High Court—Collector's order if part of cause of action in such a case—S 106 (2) of Government of India Act if a bar to suit—Civil Procedure Code, S. 19—If confers jurisdiction in such a case—Resides and carries on business in section—Meaning of—Inapplicability to Government.

The plaintiff made sales of a quantity of gold thread to customers in Salem and Coimbatore. The gold thread was despatched to the purchasers from Nellikuppam in South Arcot, and in transit it was seized by the Inspector of Customs, Cuddalore Circle. The Collector of Customs to whom an appeal lay from the District Officer, or who rather had to affirm or disaffirm the action of the District Officer, made an order whereby he confiscated the goods and ordered their sale. The plaintiff preferred an appeal to the Governor in Council, but that appeal was rejected. He thereupon instituted a suit on the Original Side of the High Court for the recovery of his goods or their value. The suit was one of trover against the Secretary of State on the ground that what was done amounted to a wrongful conversion of the goods, his case being that the orders made were illegal inasmuch as in truth and in fact his goods were never smuggled at all. He did not even obtain leave to sue.

Held, that no part of the cause of action arose in Madras and the suit was accordingly not maintainable.

If any wrong was done it was done by the seizure and detention of the goods in Salem, or Coimbatore or Cuddalore. The order of the Collector of Customs confirming the seizure and directing the goods to be retained at Cuddalore could not make the tort in any sense committed in Madras.

Held further, that the matter was one affecting the collection of revenue within the meaning of S. 106 (2) of the Government of India Act and the Original Side of the High Court had no jurisdiction to entertain the suit on that ground.

Held also, that the Secretary of State for India, the defendant, could not be held to reside or carry on business or personally work for gain within the local limits of the jurisdiction of the Original Side of the High Court within the meaning of S. 19 of Civil Procedure Code.

S. 19 does not cover the case of Government at all. The word "resides" in the section must be taken to refer to natural persons and not to legal entities such as limited companies or Governments. The "business" intended by the section is a commercial business and not a business of State or Government.

Suit by the plaintiff for the recovery of goods or their value from the defendants filed on the Original Side of the High Court.

K. Narasimha Aiyar for plaintiff.

The Advocate-General for defendant.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS :—*Coutts Trotter, C. J.* :—The plaintiff brings this suit against the Secretary of State for India in Council in the following circumstances:—He made sales to customers in

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Salem and Coimbatore of a quantity amounting in all to 100 marcs of gold thread. The gold thread was despatched to the purchasers from a place called Nellikuppam in South Arcot and in transit it was seized by the Inspector of Customs, Cuddalore Circle, who alleged that the gold thread had been smuggled into British India and had not paid duty. The case for the plaintiff was that he had bought it ultimately through a sub-purchaser from Messrs. Parry & Co., who had imported it from France and paid duty upon it. The Collector of Customs, to whom an appeal lay from the District Officer, or who, rather had to affirm or disaffirm the action of the District Officer, made an order on the 30th July, 1924 whereby he confiscated the goods and ordered their sale. Thereupon there was an appeal to the Governor in Council which was made by the plaintiff and was rejected. He now seeks the assistance of the ordinary Courts of the land to get his goods back or their value, and he has brought this suit which is one of trover against the Secretary of State on the ground that what was done amounted to a wrongful conversion of his goods, his case of course being that the orders made were illegal inasmuch as in truth and in fact his goods never were smuggled at all.

It seems to me that there are three difficulties that the plaintiff has not surmounted. In the first place, as he did not ask the Court for leave to bring his suit on the Original Side of this Court, he is faced with this difficulty that he must show that his cause of action arose wholly in Madras. The goods never came to Madras except a very small portion by way of exhibit for the purpose of this case, and if any wrong was done it was done by the seizure and detention of the goods in Salem or Coimbatore or Cuddalore, and the only step in the whole transaction that can be suggested to have been performed within the Madras jurisdiction is the order of the Collector of Customs confirming the seizure and directing the goods to be retained at Cuddalore. It seems to me quite impossible to say that that really was an effective dealing with the goods. If the seizure of the goods was tortious it no doubt made the Collector of Customs a tort-feasor, but that is quite a different proposition from saying that, because owing to something he did in Madras he was a tort-feasor and had allied himself with tort-feasors, in Cuddalore, that makes the tort in any sense committed in Madras. That would be enough to dispose of

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this case, but two other points were raised and I think it right to deal with them.

In the first place, it is said that, apart from any question of the place in which the wrong was committed, this case can be brought within the meaning of S. 19 of the Code of Civil Procedure in its second half which provides a jurisdiction "if the defendant resides or carries on business or personally works for gain within the local limits of the jurisdiction" of the Court in question. It is said here that the Secretary of State for India, which must be taken to be a paraphrase for the Madras Government, carries on business within the limits of the jurisdiction of this Court, as the headquarters of the Madras Government is situated in Fort St. George. Similarly I suppose it would have to be contended that at some time or other jurisdiction would be conferred upon the Subordinate Judge's Court of the Nilgiris, because during certain parts of the year the headquarters of the Madras Government is at Ootacamund. In my opinion the words of the section do not cover the case of Government at all. The only doubt I had was with regard to the word "resides" occurring in the section. I was inclined to the view at one time that Government must be said to "reside" in the place where its official headquarters are located, but on consideration I think that the word "resides" must be taken to refer to natural persons and not to legal entities such as limited companies or Governments. With regard to limited companies, they of course will be covered by the words "carries on business," and it was very strenuously argued that the business of Government being to govern, Government must be deemed, within the meaning of the section, to carry on business at its headquarters. In my opinion the words that follow in the alternative "or personally works for gain" show that the business intended by the section is a commercial business and not a business of State or Government.

The result will be one that really works no hardship. There is always a jurisdiction given within the local area where the wrong was done and it would have been perfectly open to the plaintiff here to sue the Secretary of State either in Salem or in Coimbatore or in Cuddalore—wherever the goods were in fact taken out of his possession. He has not chosen to do so. He has chosen to bring a suit on the Original Side of this Court without even taking the trouble to apply for leave on the ground that part of the cause of action arose within its jurisdiction.

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Finally the point is taken on behalf of the Secretary of State that this is a matter affecting the revenue and that section 106 (2) of the Government of India Act covers the matter. On that subject I have nothing to add to what I said in my own considered judgment which is reported in *Best & Co., Ltd.* v. *The Collector of Madras* (1), where I had to consider all the decisions affecting this matter and came to the conclusion that, however antiquated the section is and however useless according to present conditions, so long as it was allowed to stand in the statute book it must be given effect to, and the effect is this, that in matters affecting the revenue the Original Side of this Court and that Side alone is debarred from interfering in revenue matters. The section came to birth, nearly 100 years ago, when there was a conflict of jurisdiction between the Sudder Courts and the High Courts. That conflict has utterly vanished and there is no justification whatever for preserving this antiquated fossil on the statute book; but there it is, and so long as it is there we have to abide by it. I am quite clear that this is a matter affecting the collection of revenue though it be in the nature of a penalty and that therefore this Court has no jurisdiction to entertain the suit on that ground. For all these reasons I am of opinion that the plaintiff's suit is demurrable and must be dismissed with costs.

Beasley, J.

Beasley, J. :—The plaintiff who trades in gold thread sold 100 marcs of gold thread to his constituents in Salem and Coimbatore and sent them to those constituents by registered post. When they arrived at their respective destinations they were seized under the orders of the Inspector of the Cuddalore Customs Circle, who also sent a notice to the plaintiff calling upon him to show cause why the goods so seized should not be confiscated under Ss. 12 and 13 of the Land Customs Act. I think it would be well to explain what the procedure is. The local Inspector, where the goods seized are of the value of Rs. 250 or under, is empowered either to order those goods to be returned to their owner or to confiscate them if he thinks a good case for confiscation has been made out. Where the goods are of more than the value of Rs. 250 he can order them to be returned. He has full power to do so if he thinks that they are goods which ought never to have been seized, but he cannot make an order of confiscation; he has to refer the matter to the Collector of Customs at Madras, who either confirms

1. (1918) 35 M L J 23.

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the seizure by making an order of confiscation of the goods or orders their return to their owner. From this order of the Collector of Customs in Madras there is an appeal to His Excellency the Governor in Council. The plaintiff having received a notice calling upon him to show cause why his goods already seized should not be confiscated duly appeared before the local Inspector but notwithstanding his appearance and his contentions the local Inspector referred the matter to the Collector of Customs, Madras. In view of the procedure I have already referred to it is obvious that the action of the local Inspector in referring the matter to the Collector of Madras indicates that, had the value of the goods been Rs. 250 or under, he himself would have made the order confiscating them. The Collector of Customs, Madras, made an order confiscating the goods and this order was duly communicated to the local Inspector who informed the plaintiff of the confiscation of the goods. The plaintiff then preferred an appeal to the Governor in Council who dismissed his appeal. The plaintiff now claims the return of the goods or their value from the defendant.

Two preliminary objections are taken by the defendant to the jurisdiction of this Court to try the plaintiff's suit. One is to the territorial jurisdiction and the other is, by reason of section 106 (2) of the Government of India Act, 1915 the High Courts may not exercise any original jurisdiction in any matter concerning the revenue or concerning any act done or ordered to be done in the collection thereof according to the usage and practice of the country or the law for the time being in force; and it is contended that this is a matter concerning the revenue or is an act done or ordered to be done in the collection of it. With regard to the first objection the point is whether the cause of action arose wholly within the local limits of this High Court or in part. Clearly if no part of the cause of action arose within the local limits of the High Court the objection founded on the earlier part of clause 12 of the amended Letters Patent is well founded and even if part of the cause of action arose within the local limits it is equally well founded because the leave of the Court to sue here must first have been obtained and no such leave has been obtained. The plaintiff's contention here is that the suit is for conversion of his goods and that the act of conversion was the order for the confiscation of his goods made here in Madras by the Collector of Customs. He could have sued for damages for the wrongful

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seizure of his goods. In such a case he must have preferred his suit in the mufassal Court in the place where the goods were seized; or he could have sued for damages both for wrongful seizure and for conversion, or, as here, sued for conversion only; but in the latter case to allege that the tort was wholly committed in Madras seems to me to be opposed to obvious facts. The goods were seized outside the local limits of this Court. Without such seizure no order for confiscation could have been made by the Collector of Customs, Madras. The first essential was this seizure. What was it that was required to make that seizure effective? The confiscation order of the Collector of Customs, Madras, and even that seizure was not made effective until the order of confiscation of the goods was received by the local Inspector in the mufassal. The confiscation then became complete in the place where the seizure was carried out originally and not in Madras. The goods were never at any time in Madras except for a small portion of them which have been brought here for the purpose of being exhibited in this suit. The plaintiff cannot be heard to say that the seizure was lawful because in his plaint he describes it as unlawful and the whole basis of his claim must be wrongful seizure. The seizure here cannot be right and the confiscation wrong. Either the seizure and the order for confiscation were right or both were wrong. For the purpose of upholding the objection on this part of cl. 12 of the Letters Patent it is only necessary to hold that only a part of the cause of action arose outside the local limits of this High Court. For the reasons I have already stated I have no difficulty whatever in so holding.

The next contention is that even so he can sue by reason of the latter part of clause 12 of the Letters Patent, which is:

"or if the defendant shall dwell or carry on business or personally work for gain within those limits."

It is contended that the defendant both dwelt and carried on business here at the commencement of the suit and in support of this contention the plaintiff has cited the decision of a Bench of this Court in *Subbaraya Mudali* v. *The Government and Cunliffe* (2). In that case it was held that under clause 12 of the Letters Patent the Government must be considered as carrying on business at the place where its members exercise all the functions of Government, that is, in Madras. But even in that case the word "dwell" was consider-

2. (1863) 1 M H C R 286.

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ed inapplicable to the Government. On the other hand in *Daya Narain Tewary* v. *The Secretary of State for India* (3) it was held by a Bench that the words "carrying on business or personally work for gain" are inapplicable to the Secretary of State for India in Council. At page 273 in the course of this judgment Mitter, J., says:

"that the word 'business' in clause 12 of the Letters Patent was used in a restricted sense is also indicated by the words 'personally work for gain' to be found in the same section. The latter words would be unnecessary if the word 'business' had been intended to be used in an unrestricted sense."

And with that statement I am in entire agreement. In my view the Government cannot be said to be carrying on business within the meaning of the word in that clause of the Letters Patent. This decision in *Daya Narain Tewary* v. *The Secretary of State for India* (3) was followed in *Rodricks* v. *The Secretary of State for India* (4). We are not here bound by the decision in *Subbaraya Mudali* v. *The Government and Cunliffe* (2) and as I am in agreement with the Calcutta decisions I have no hesitation in following them. Nor do I think that Government can be said to dwell anywhere. Whereas the words "carrying on business" apply to a corporate body and to limited companies and "personally work for gain" to an individual or individuals, the word "dwell" can only apply to an individual in a private sense and not to an entity. A corporation cannot be said to dwell anywhere. It may have an office where it carries on business but it does not dwell there. A dwelling denotes a place where a person resides, eats and sleeps. In my view therefore this Court has no territorial jurisdiction to try this suit.

The only remaining objection is that this High Court on its Original Side cannot try this case by reason of section 106 (2) of the Government of India Act.

That sub-section reads as follows:—

"The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue or concerning any act done or ordered to be done in the collection thereof according to the usage and practice of the country or the law for the time being in force."

It is contended by the defendant that this is a matter concerning the revenue or concerning an act done in the collection thereof; and it is not out of place in this connection to mention

2. (1863) 1 M H C R 286. 3. (1887) I L R 14 C 256.
4. (1913) I L R 40 C 308.

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what is done with goods seized and confiscated. They are sold and the proceeds go to the customs. Part of the revenue of the country is derived from the customs and the collection of the customs is a collection of part of the revenue of the country and I am prepared to hold that the sale of seized and confiscated goods and the taking by the customs authorities of those proceeds is the collection of customs and therefore of revenue. It is admitted by Mr. Narasimha Aiyar that penalties in the shape of double or treble duties imposed on smuggled goods would be revenue. Yet he contends that the money derived from the sale of seized or confiscated goods is not. I cannot myself see any distinction whatever. I may conjecture that one of the objects of the sale is to recoup the customs for the unpaid duty which, had it been paid, would have been revenue. But there is another obvious reason for this penalty and it is this: persons who bring dutiable goods into the country are required to declare their possession of them and to pay the proper duty which is then collected from them and becomes part of the revenue of the country. That is clearly the collection of revenue. If, however, persons smuggle dutiable goods into the country they prevent the collection of the duties and so the revenue. The object of the seizure and confiscation is two-fold, to punish the offender and to deter others from preventing or hindering the collection of revenue; and it seems to me impossible to hold that the seizure and confiscation of smuggled goods is not an act ordered or done in the collection of revenue, as it is obviously designed to facilitate the collection of customs and therefore the revenue.

The decision in *Alcock, Ashdown and Company, Ltd.* v. *The Chief Revenue Authority of Bombay* (5) has in my opinion no application to this case. That case dealt with a mandamus to the Income-tax Officer to make an assessment and was a matter which was merely a preliminary towards the assessment of the assessee. The acts complained of in this case were not in any sense preliminary but in my view directly related to the collection of customs. I may add that the question as to whether or not section 106 (2) of the Government of India Act does prohibit the exercise by this Court of its original jurisdiction in revenue matters has been decided by the learned Chief Justice in *Best & Co, Ltd.* v. *The Collector of Madras* (1) and he there decided that the section was an express prohibition

1. (1918) 35 M L J 23.
5. (1923) I L R 47 B 742: 45 M L J 592 (P C).

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against the exercise of such powers. I need not say more than that I entirely agree with his judgment and with the reasons he gave therein. I agree with the learned Chief Justice that both the objections are fatal to the plaintiff's suit and that it must therefore be dismissed.

Attorney for defendant: *Government Solicitor.*

A. S. V. *Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE RAMESAM.

K. M. Chokkalingam Chettiar ... *Appellant** (*Plaintiff*)

v.

At. Ar. Athappa Chettiar ... *Respondent* (*1st Deft.*).

Chokkalingam Chettiar v. Athappa Chettiar.

Mortgagor and mortgagee—Estoppel—Mortgagor—Title to mortgaged property—Plea of absence of—Maintainability—Registration Law—Fraud on—Invalidity of registration on grounds of—Purchase of property to facilitate registration at a particular place—Purchase real—Intention to include property in mortgage or sale deed executed in respect thereof—Effect.

A mortgagor is estopped from pleading that he had no title to the property which he has expressly mortgaged on the representation that it belonged to him.

Under a sale deed dated 13th June, 1913 the 1st defendant purchased a house in Erode for Rs. 200. On 14th June, 1913, he executed the suit mortgage mortgaging that house and another house in Devakottai. The mortgage deed was registered at Erode. About a year later, the mortgagor reconveyed the house at Erode to the vendor, the deed of reconveyance expressly stating that the Rs. 200 which was the consideration for it was to go in discharge of the suit mortgage debt.

Held that, though the parties wanted to get the mortgage deed registered at Erode and the purchase of the house at Erode on 13th June, 1913 was made to facilitate the registration at Erode, yet as it was a real purchase and the parties intended that the house at Erode should be included in the mortgage as clearly appeared from the recitals in the deed of reconveyance, there was no fraud upon the registration law, and the registration of the mortgage at Erode was not invalid on that ground.

It will be a broad proposition unsupported by any authority to say that, where a person *bona fide* buys property for the purpose of facilitating registration of a transaction and also *bona fide* includes it in a sale or mortgage, he commits a fraud on registration, which would render the whole transaction invalid.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura dated 8th February, 1923 in O. S. No. 63 of 1921.

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*Appeal No. 290 of 1923. 22nd March, 1927.

Chokkalingam Chettiar v. Athappa Chettiar.

A. Krishnaswami Aiyar and *K. Balasubramania Aiyar* for appellant.

K. Bhashyam Aiyangar and *S. Krishnaswami Aiyangar* for respondent.

The Court delivered the following

JUDGMENT :—This appeal arises out of a suit filed by the plaintiff as assignee of a deed of mortgage Ex. A dated the 14th June, 1913 executed by the 1st defendant in favour of the 2nd defendant, his son-in-law. The assignment by the 2nd defendant to the plaintiff is Ex. B dated the 20th July, 1914. The 2nd defendant at the time of the execution of Ex. B also executed a security bond Ex. F indemnifying the plaintiff. The 2nd defendant according to the plaint made several payments which are set out in the plaint, amounting in all to Rs. 12,301-0-3 and the present suit is filed for the recovery of the balance of Rs. 6,529-4-6 with costs and further interest. The mortgage deed recites the consideration and also states that two items of property were mortgaged One is a house in Devakottai and the other is a house in Erode. The house in Erode was purchased under a sale deed Ex. I on the 13th June, 1913 for Rs. 200 and this was included in the deed of mortgage. The property purchased under Ex. I was afterwards reconveyed to the vendor under Ex. II, and Ex. II recites that the Rs. 200 for which it was reconveyed should be paid to the mortgagee thereby making it clear that on the date of the reconveyance the property was treated as subject to the mortgage. Two defences were raised for purposes of this appeal. It is said that Item I, which was the property purchased in Erode, was purchased not *bona fide* with the object of acquiring the property but was ostensibly purchased for the purpose of giving jurisdiction to the Erode Registrar to register the document, that no property was intended to be passed and that the transaction was intended for the purpose of effecting a fraud on registration. The other defence is that there was no consideration for the mortgage document itself as it was executed to prevent the 2nd defendant from ill-treating or discarding his wife, the daughter of the 1st defendant. The Subordinate Judge found both these points in favour of the defendant and dismissed the suit. We shall first deal with the question of consideration. So far as the evidence of consideration goes we have the fact that not only the document recites the consideration but it also appears that there was a transfer to the plaintiff on the footing that it was a mortgage

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on which the money mentioned under it was due. There is no evidence worth the name that the plaintiff did not pay consideration for the transfer, nor is it shown that the plaintiff has any connection with the 1st and 2nd defendant so as to suggest that the transfer to him was only nominal. He is only a Koil Pangali, that is a person connected with the temple. He is not a near relation nor is he a partner of the 2nd defendant. It is not suggested nor is there any evidence to show that the 2nd defendant did not pay the part payment mentioned in the plaint and which is also supported by evidence. One important point worth noticing is the conduct of the 1st defendant. It is proved by the evidence that the plaintiff gave the 1st defendant notices claiming the amount due under the mortgage and these are filed as Exs. C., C-1, E., E-1, E-2 and E-3 and D. As regards two of these notices at least there is the postal acknowledgment signed by the 1st defendant and there is no doubt that he had received the notices of claim. One of these notices sent through a vakil threatens a suit in default of payment and one would ordinarily expect that if the present case that there was no consideration for this transaction is true the 1st defendant would have sent a reply notice repudiating the claim stating that nothing was due on the mortgage. He however kept quiet. So far as the 2nd defendant is concerned he is said to have become an insolvent and gone to Karaikal. Then we have the fact that subsequent to this mortgage the property is transferred by the 1st defendant's wife to the daughter of the 2nd defendant; and a plea was raised that the property did not belong to the 1st defendant but it was the property of his wife. We need not consider the truth of that plea here as we think it is clear that the 1st defendant is estopped from pleading that he had no title to the property which he has expressly mortgaged on the representation that it belonged to him. We will say nothing more about this plea because possibly there may be litigation between the 2nd defendant's daughter and the mortgagee. Having regard to the conduct of the 1st defendant we think that there is no reason to discredit the evidence of the plaintiff and his witness and to accept the statement of the 1st defendant that there was no consideration for this document We are not satisfied with the reasons given by the Subordinate Judge for holding that this document was executed without consideration. The fact that the 1st defendant did not repudiate the notices of claim for payment of the mortgage amount and the fact that the 2nd defendant was making part payments towards the mortgage amount

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clearly discount the evidence of the 1st defendant that no consideration passed.

The next question for consideration is as regards the validity of the registration. The case for the respondent is that there was no intention to purchase the property, that no consideration was paid for it and that the whole transaction was a device to get Ex. A executed and registered at Erode. There is no doubt that the parties wanted to get the document registered at Erode. But the question is whether in effecting that intention they really did anything which would invalidate the document. It will be a broad proposition unsupported by any authority to say that where a person *bona fide* buys property for the purpose of facilitating registration of a transaction and also *bona fide* includes it in a sale or mortgage, he commits a fraud on registration, which would render the whole transaction invalid. In such a case nobody is cheated. There is the intention to buy the property. The title of the property is in the person who conveys it, or mortgages it. Under the Registration Act a copy of the registered document is sent to the other district where the other property is situated and the mere fact that a man wants to facilitate a transaction should not in our opinion render the transaction invalid if there is no other objection to the transaction. In cases where a non-existing property is mentioned or in cases where property which is existing but which does not belong to the mortgagor or vendor is mentioned or in cases where the parties enter into a nominal transaction without any intention of title passing and yet the sale is registered, in such cases it may be said that there is a fraud with the object of defeating the provisions of the Registration Act. Here both the parties were aware of what was going on and nobody is cheated by it. Having regard to the evidence we are not justified in holding that there was no intention to purchase the property and include it under the mortgage. The fact that in our opinion weighs against the theory of any intention to defraud is that the reconveyance is about a year after the purchase and the reconveyance expressly states that the Rs. 200 which is the consideration for the reconveyance is to go in discharge of the mortgage debt. When we look at the case from the point of view of the recitals in the document it is difficult to hold that there was no intention to include the property under the mortgage security. Where a person includes the property in the mortgage security and asks the transferee to pay the Rs. 200 in discharge of the mortgage debt his intention is clear that the

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property should be included in the mortgage. Against this what have we got? We have only the statement of the 1st defendant and the statement of the vendor, who has himself transferred the property to some third person. There is nothing against his interest now because even if his evidence is disbelieved, he still remains the owner of the property competent to transfer it. We cannot say that the evidence of this D. W. 1 is entitled to any credit having regard to the recitals in the document. In the view we take of the case, we think it is unnecessary to consider the cases quoted by Mr. Bhashyam Aiyangar for the respondent. We think that the plaintiff has proved his case. We reverse the decree of the Subordinate Judge with costs here and the Court below. There will be the usual mortgage decree to the plaintiff for the amount claimed with interest from the date of plaint till the date of realisation.

Time for redemption is six months from this day.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER AND MR JUSTICE MADHAVAN NAIR.

Parambarathil Patukkayil Chakkutti and others ... *Appellants** (*Plaintiffs*)

v.

Kothambra Chandukutti ... *Respondent* (*1st Deft.*).

Patukkayil Chakkutti v. Kothambra Chandukutti.

Malabar Law—Makkatayam Thiyyas—Law governing—Hindu Law—Customary law—Presumption—Onus of proof—Hindu Law—Applicability of, as customary law—Impartibility of property—Onus of proof—Evidence.

The Makkatayam Thiyyas are governed by what is called the customary law, and when a question arises as to what is the rule of law governing them on any particular matter, what the Court has to see is what is the rule of customary law obtaining amongst them in that matter, and in cases which are not sufficiently covered by prior decisions the question will have to be determined with reference to the evidence in the case. In the absence of any satisfactory evidence to show what exactly is the rule of the customary law on any particular point, the rule of Hindu Law on that point must be presumed and adopted to be the rule of the customary law obtaining amongst the community on that point. The presumption is not that the Hindu Law as such is the law governing them in all matters. The presumption is simply that the rule of Hindu Law is also the rule of the customary law obtaining amongst them, so that if any person alleges that the rule of the customary law on any particular point is something different the evidence that he adduces in support of his allegation ought not to be subjected to

*S. A. No. 122 of 1924. 17th March, 1927.

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those well-known tests which are applied to the case of an alleged custom contrary to, or in derogation of, the law, but should be viewed simply as evidence adduced to show what is the rule of the customary law itself. The presumption therefore will be useful and will hold good only if satisfactory evidence is not forthcoming as to what is the rule of the customary law.

Raman Menon v. *Chathunni*, (1893) I L R 17 M 184 considered.

The expression "any custom having the force of law" in section 16 of Madras Act (III of 1873) is wide enough to include the customary law which governs the communities to which the Act applies.

Where the appellants, Thiyyas of Calicut following the Makkatayam Law, alleged that the family property was impartible, but adduced no evidence to show that the property was impartible according to the customary law of the parties and simply relied upon *Raman Menon* v. *Chathunni*, (1893) I L R 17 M 184, in support of their contention:

Held, that the presumption that the Hindu Law rule of partibility was also the rule of the customary law hold good and that the rule of compulsory partition therefore applied to the case.

Second Appeal against the decree of the District Court of South Malabar in A. S. No. 281 of 1922 preferred against the decree of the Court of the Additional District Munsif of Calicut in O. S. No. 368 of 1921.

K. P. Ramakrishna Aiyar for appellants.

M. C. Sridharan for respondent.

The Court delivered the following

JUDGMENT :—The parties to this second appeal are Thiyyas of Calicut following the Makkatayam Law. The sons of the 2nd defendant are the appellants.

In a suit instituted by the 1st defendant against the 2nd defendant and his deceased brother Kelan (O. S. No. 1258 of 1916) he obtained a money decree against the 2nd defendant personally and against defendants 3 to 5, the wife and children of the deceased Kelan. In execution of that decree he attached the family properties in possession of the 2nd defendant. This second appeal arises out of the suit instituted by the appellants for a declaration that the properties attached for the decree in O. S. No. 1258 of 1916 are not liable to be attached and sold for that decree. The Lower Courts overruled the appellants' contention and dismissed their suit.

In second appeal it is argued that the suit property is impartible according to the Makkatayam Law governing the Thiyyas of Calicut and is not liable to be attached and sold. The question whether the property is impartible or not was not raised by the plaintiffs as a point for decision either in the pleadings or

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in the issues; but in support of the argument that the suit property is impartible the learned vakil for the appellants relied here as in the Court below on the decision in *Raman Menon* v. *Chathunni* (1). It is no doubt true that the parties to this suit are, as in *Raman Menon* v. *Chathunni* (1), Makkatayam Thiyyas of Calicut, but we think that that decision must be confined to the facts and circumstances in that particular case and ought not to be understood as a decision applicable generally to all the Thiyya families. In that case the plaintiff alleged that, according to the customary law prevailing among the Thiyyas, the 1st defendant was entitled to a definite share in the property, and the defendants pleaded that the properties were indivisible. The issue raised was vague and the evidence adduced was inconclusive and the witnesses were not even asked the real question at issue. But the Subordinate Judge, on the authority of two unreported cases, came to the conclusion that the ordinary rule of Marumakkatayam against compulsory partition was equally applicable to Thiyyas who followed Makkatayam. In Second Appeal Muthusami Aiyar and Best, JJ., observed that it should not have been decided in that way and they framed an issue, viz.:

> "Whether according to the customary law followed by the parties to this suit, compulsory partition can be effected according to the wish of one member of the tarwad" .

and called for a finding on it after taking fresh evidence. In compliance with the said order the Subordinate Judge held that there was no presumption that the Hindu Law of partibility of family property applied to the case of Makkatayam Thiyyas quoting *Rarichan* v. *Perachi* (2) as authority for that position, that there was no written evidence in support of such a custom and that the oral evidence was quite unsatisfactory or insufficient to establish any such alleged custom or compulsory partition and returned a finding in the negative. The learned Judges simply accepted that finding in second appeal and did not independently consider the question themselves. In view of the fact that the finding was not arrived at on any satisfactory evidence in the case and that even the Subordinate Judge's reading of the decision in *Rarichan* v. *Perachi* (2) is not quite correct as we shall presently show, we think that *Raman Menon* v. *Chathunni* (1) should not be considered as a decision generally applicable to all families among Thiyyas. The same view has been expressed

1. (1893) I L R 17 M 184. 2. (1892) I L R 15 M 281.

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in Second Appeal No. 580 of 1917 by Phillips and Krishnan, JJ. though by way of *obiter*. This is what the learned Judges state:

"We would only observe that it is questionable whether a single decision in *Raman Menon* v. *Chathunni* (1) can be said to be a final decision binding on all Thiyyas of Calicut."

The decision in *Velu* v. *Chanru* (3) that the case of *Raman Menon* v. *Chathunni* (1) relating to the Thiyyas could not be taken to lay down that the rule of partibility does not prevail among the Iluvans of Palghat, even assuming that the Iluvans and the Thiyyans had at one time been of one class also lends support to our view.

We think the Makkatayam Thiyyas are governed by what is called the customary law and when a question arises as to what is the rule of law governing them on any particular matter, what we have to see is what is the rule of customary law obtaining amongst them in that matter and in cases which are not sufficiently covered by prior decisions the question will have to be determined with reference to the evidence in the case. Vide *Rarichan* v. *Perachi* (2), *Raman Menon* v. *Chathunni* (1) and *Kunhi Pennu* v. *Chiruda* (4) in each of which a specific issue was raised as to what is the rule of the customary law on the particular question at issue and the Lower Court was asked to submit a finding after taking fresh evidence on it. See also *Imbichi Kandan* v. *Imbichi Pennu* (5) where the learned Judges observe that the Subordinate Judge was right in laying down that the question for decision was whether

"according to the law and custom followed by Makkatayam Thiyyas of Calicut, property of a deceased person . . . ."

In the absence of any satisfactory evidence to show what exactly is the rule of the customary law on any particular point, the rule of Hindu Law on that point must, we think, be presumed and adopted to be the rule of the customary law obtaining amongst the community on that point. The presumption is not that the Hindu Law as such is the law governing them in all matters; if that be the presumption a person who alleges a rule of customary law at variance with it will have to prove it as a custom in derogation of the law. The presumption is simply that the rule of Hindu Law is also the rule of the customary law obtaining amongst them, so that if any person alleges

1. (1893) I L R 17 M 184. 2. (1892) I L R 15 M 281.
3. (1898) I L R 22 M 297. 4. (1896) I L R 19 M 440.
5. (1895) I L R 19 M 1.

that the rule of the customary law on any particular point is something different the evidence that he adduces in support of his allegation ought not to be subjected to those well-known tests which are applied to the case of an alleged custom contrary to, or in derogation of, the law, but should be viewed simply as evidence adduced to show what is the rule of the customary law itself. The presumption therefore will be useful and will hold good only if satisfactory evidence is not forthcoming as to what is the rule of the customary law. If the learned Judges in *Thaikkandhi Pokkencheri* v. *Illivathukkal Achuthan* (6) or in S. A. No. 2092 of 1920 intended to lay down that the Hindu Law as such governs the community in all matters and that a person alleging a contrary rule of law must prove it as a custom opposed to or in derogation of the law, we must, with due respect, express our dissent from them.

We respectfully agree with the observations of the learned Judges in *Rarichan* v. *Perachi* (2) on the point under consideration. In that case a person died leaving some self-acquired property and his brother claimed to succeed to it in preference to the widow. He adduced satisfactory evidence to show that according to the customary law prevailing amongst the parties the brother succeeds in preference to the widow. The Munsif decreed the suit in favour of the brother, but the District Judge reversed his decree on the assumption that the Hindu Law applied to the parties in all matters and that any other custom alleged must be proved as a custom in derogation of the law. The High Court in second appeal observed that that is not the correct view and that the only question is what is the law governing the parties on the particular matter and called for a fresh finding. In compliance with the said order, the District Judge on a consideration of the evidence agreed with the Munsif that according to the customary law governing the parties the brother succeeded in preference to the widow and the said finding was accepted in second appeal. In this connection reference might also be made to the well-known decision of the Judicial Committee *Fanindra Deb Raikat* v. *Rajeswar Das* (7). In that case the question was whether in a family which their Lordships of the Privy Council held to be not governed by the ordinary Hindu Law, there was a family custom which did not allow an adopted son to inherit. On the evidence adduced in

2. (1892) I L R 15 M 281. 6. (1920) 39 M L J 427.
7. (1885) I L R 11 C 463 : L R 12 I A 72 (P C).

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that case it was held by the Privy Council that the custom referred to above was proved. As regards the question for consideration, their Lordships observed that the question was not whether the general Hindu Law was modified by a family custom forbidding adoption and as regards the evidence relating to custom, their Lordships observed as follows:

"Whether if the Baikantpur family were shown to have become Hindus out and out saving only special customs, such evidence would be sufficient to prove a special custom, need not be discussed here. The family is in a totally different position. And their Lordships have no hesitation in holding that, whatever Hindu customs may have been introduced into it, the custom of succession by adoption has not been introduced."

These observations also clearly support the view we have expressed above.

Oldfield, J., in *Raman* v. *Muthu* (8) with whom Hughes, J., agreed, is not apparently prepared to accept *Rarichan* v. *Perachi* (2) as laying down the correct law mainly on the ground that neither *Rarichan* v. *Perachi* (2) nor any of the cases *Raman Menon* v. *Chathunni* (1), *Imbichi Kandan* v. *Imbichi Pennu* (5) and *Kunhi Pennu* v. *Chiruda* (4) in all of which *Rarichan* v. *Perachi* (2) is referred to with approval mentions S. 16 of Act III of 1873 (The Madras Civil Courts Act) and that by virtue of that section in the absence of proof of special custom Hindu Law has to be administered to Hindus. S. 16 only says that

"Where, in any suit or proceeding, it is necessary for any Court to decide any question . . . (*a*) the Muhammadan Law in cases where the parties are Muhammadans, and the Hindu Law in cases where the parties are Hindus, or (*b*) any custom (if such there be) having the force of law and governing the parties or property concerned, shall form the rule of decision"

We think that the expression "any custom having the force of law" is wide enough to include the customary law which governs such communities and that we are not therefore bound to apply to them the ordinary Hindu Law as such. The cases above referred to clearly hold—and we think rightly—that the question in each case is what is the rule of the customary law on the particular point arising for decision and this position does not in any way contravene the provisions of S. 16 of Act III of 1873.

We may also observe that *Rarichan* v. *Perachi* (2) does not say that there is no presumption that the rule of Hindu Law on any particular point is rule of the customary law governing

1. (1893) I L R 17 M 184. 2. (1892) I L R 15 M 281.
4. (1896) I L R 19 M 440. 5. (1895) I L R 19 M 1.
8. (1920) 40 M L J 301.

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the Thiyya community on that point. All that it says is that if satisfactory evidence is produced to show that the rule of the customary law is otherwise, effect should be given to it.

In the present case the appellants simply relied upon the decision in *Raman Menon* v. *Chathunni* (1) in support of their contention that the family property is impartible and have not adduced any evidence to show that the property is impartible according to the customary law of the parties. As we pointed out above, the case *Raman Menon* v. *Chathunni* (1) cannot be held to be a general decision applicable to all the Thiyya families. As the plaintiff have not adduced any satisfactory evidence to show that the rule of customary law on this point is anything other than the Hindu Law rule of partibility we must hold that the presumption that the Hindu Law rule of partibility is also the rule of the customary law holds good and the rule of compulsory partition therefore applies to the present case.

In the result we confirm the decree of the Lower Court and dismiss this second appeal with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice.*

The Chingleput Municipal Council represented by its Chairman and another ... *Appellants** (*Defendants*)

v.

Ayyakannu Thambiran ... *Respondent* (*Plaintiff*).

The Chingleput Municipal Council v. Ayyakannu Thambiran.

Madras District Municipalities Act, S. 98—Carriage let out for hire within the Municipality—Motor bus plied for hire up and down the Municipality if a.

Held, that a motor bus which plied for hire up and down a Municipality was clearly a carriage let out for hire within the Municipality on the true construction of S. 98 of the District Municipalities Act.

Second Appeal against the decree of the District Court of Chingleput in A. S. No. 156 of 1924 preferred against the decree of the Court of the District Munsif of Chingleput in O. S. No. 189 of 1924.

C. Narasimhachariar and *M. E. Rajagopalachari* for appellants.

Dr. S. Swaminadhan for respondent.

*S. A. No. 925 of 1925. 11th February, 1927

1. (1893) I L R 17 M 184.

The Court delivered the following

JUDGMENT :—In my opinion this motor-bus which plied for hire up and down the Municipality was clearly a carriage let out for hire within the Municipality on the true construction of S. 98 of the District Municipalities Act, and I really fail to understand how anybody could be supposed to feel any doubt about it. The mere fact that it is let out to several people instead of to one or that it travels on a fixed route instead of being at the beck and call of any one of the numerous or all the numerous hirers makes no difference whatever. This appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

The Chinglepet Municipal Council v. Ayyakannu Thambiran.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BEASLEY AND MR. JUSTICE CURGENVEN.

Julien Marret ... *Petitioner* (Appellant in O. S. A. No. 55 of 1925—Plaintiff)*

v.

Messrs. Mahomed Khaleel and another ... *Respondents (Respondents 1 and 3 in do.—Defendants 1 and 3).*

Julien Marret v. Messrs. Mahomed Khaleel.

Civil Procedure Code, S. 110—Substantial question of law—Deed difficult—Construction of—Question as to—Negligence in solicitor—Finding as to—Concurrent findings of fact—Test—Reasons for finding given by two Courts different—Effect.

The construction of a difficult document is a mixed question of law and fact.

The question of negligence or no negligence is one of fact. In this respect negligence in solicitors does not stand on a different footing from negligence in a railway company or a tramway company or an individual.

A finding of fact of two Courts does not cease to be a concurrent finding within the meaning of the rule of the Privy Council as to non-interference with concurrent findings of fact of the Courts below merely because the appellate Court gives different reasons for concurring in the finding of the Court below. It is the finding that matters and not the reasons which cause the finding to be arrived at.

Petition praying that in the circumstances stated therein and filed therewith the High Court will be pleased to grant leave to appeal to His Majesty in Council against the judgment and

*C M P No. 94 of 1927. 19th January, 1927.

Julien Marret v. Messrs. Mahomed Khaleel.

decree of the High Court, Appellate Jurisdiction in O. S. A. No. 55 of 1925, preferred against the decree of the High Court passed in the exercise of the Ordinary Original Civil Jurisdiction in C. S. No. 1083 of 1922.

T. N. C. Srinivasavaradachariar for petitioner.

P. Jagannadhan and *R. Srinivasan* for respondents.

The Court made the following

ORDER :—This is an application for leave to appeal against our decision. The respondents are Khalil Shirazi & Sons, the first respondents and Messrs. King and Partridge, second respondents. With regard to the first respondents we are clearly of the opinion that there is a substantial question of law to be decided. We had considerable difficulty ourselves in construing what was called in the course of the trial the Indemnity bond. In our view the construction of a difficult document is a mixed question of law and fact and as regards the law we are clearly of the opinion that it is a substantial question. Therefore without saying anything more we grant the application of the appellants and give them leave to appeal against our decision with regard to the first respondents.

With regard to the second respondents, Messrs. King and Partridge, the case is entirely different. The case against them was a claim for damages for negligence. It is contended here that the question of negligence of the second respondents is a question of law. It is perfectly clear that in cases of negligence which causes damage to anybody, 99 cases out of 100 raise questions of fact and it has been held over and over again that questions of negligence are questions of fact. It is argued by the appellants that in the case of the second respondents who are solicitors it is a question of law as to whether upon the facts as found by us we ought not in law to have held that Messrs. King and Partridge were guilty of negligence. We see no authority whatever for that contention. The burden of showing that negligence in solicitors is on a different footing from negligence in a railway company or a tramway company or an individual is clearly upon the appellants and no authority has been cited to us as holding that in the case of solicitors what in the case of everybody else is a question of fact becomes a question of law. Even in the case of a suit for damages for malicious prosecution whilst in England it is a question of law for the Judge and of fact for the jury, here it has been held to be entirely a question of fact for the Judge and that was held in

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Pestonji M. Mody v. *The Queen Insurance Co.* (1), a decision of the Privy Council. It is perfectly clear also from other decisions of the Privy Council that where the Privy Council have before them concurrent findings of fact they will not interfere unless some principle of law or procedure has been violated. In this case Mr. Justice Waller on the Original Side found that Messrs. King and Partridge had not been guilty of negligence. The case came before us on appeal and we have upheld that finding. These are concurrent findings. It may be that in the course of our judgment we have given different reasons to those given by Mr. Justice Waller but it is the finding that matters and not the reasons which cause the finding to be arrived at. There has been an entire failure on the part of the appellants to show us that we have violated any principle either of law or procedure. Therefore this application for leave to appeal so far as our judgment is concerned with regard to the second respondents must be dismissed with taxed costs in favour of the second respondents. The appellants will get their costs against the first respondents.

A. S. V. *Decree modified.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt.*, *Chief Justice*, MR. JUSTICE WALLACE AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax,
Madras ... *Referring Officer**
v.
Linga Reddi ... *Respondent.*

F. B.
Commissioner of Income-tax v. Linga Reddi.

Indian Income-tax Act (XI of 1922), Ss. 2 (1) and 4 (viii)—Agricultural income—Profit from manufacture of salt if amounts to—Licensee of salt factory—Profits from manufacture of salt—Liability to income-tax.

The words "agricultural purposes" in S. 2 (1) of the Indian Income-tax Act cannot be held to cover the process of flooding the land occupied by letting in the sea water and then extracting the sodium chloride from it by eliminating the other chemical constituents. Consequently a licensee of salt factory is liable to pay income-tax on the profits he makes by the manufacture of salt.

*Referred Case No. 2 of 1926. 27th April, 1927.

1. (1900) I L R 25 B 332 : 10 M L J 300 (P C).

F. B.

Commissioner of Income-tax v. Linga Reddi.

Case stated under S. 66 (2), Act XI of 1922 by the Commissioner of Income-tax, Madras, in the matter of Linga Reddi, Nellore District (Mypad), a licensee of the Krishnapatam Salt Factory.

The Case stated by the Commissioner of Income-tax, Madras, was as follows:—

"Under S. 66 (2) I have the honour to refer for the opinion of the High Court the question whether income from the production of salt is agricultural income within the meaning of S. 2 (1) of the Income-tax Act.

2. The petitioner is a licensee of the Krishnapatam Salt Factory in Nellore District. In the year of account (1924-25) he made a profit of Rs. 7,012 from salt manufacture. The question is whether this income is liable to income-tax.

3. In my opinion, income derived from the production of salt cannot be held to be agricultural income. In order that that income should come within the exemption mentioned in section 4 (3) (*viii*) of the Act it must be "revenue derived from land which is used for agricultural purposes." I do not consider that land used for the cultivation of salt can be held to be land used for agricultural purposes. Moreover the salt which produces the income is in no sense derived from land. Common salt or sodium chloride is derived in Madras from the waters of the sea. In the Bay of Bengal the constituents of sea water are:

26.06	Sodium chloride
2.81	Magnesium chloride
1.20	Potassium chloride
1.82	Magnesium sulphate
1.36	Calcium sulphate and
966.75	Water.

The whole process of manufacture consists in the separation of the sodium chloride from the other constituents of the sea. The salt factory is situated close to an estuary from which the water of the sea is led in channels to the edge of the factory. It is then baled into condensers in which the first process of evaporation takes place. As the sea water increases in density through the action of the sun's heat the calcium sulphates contained in it are separated and sink to the bottom of the condensers. The brine is then led into a series of crystallizers in which further evaporation takes place. When it has reached a density of 25 degrees Beaume, the sea water being then reduced to 1|10th of its original bulk, the sodium chloride of common salt is deposited and is scraped and stored for sale. The residue of the brine together with the magnesium salts contained in it is then drained off. It will be seen that the whole of the commodity which yields the profit is derived from sea water and not in the slightest degree from the land on which the crystallizers are situated. The only processes

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ever performed on the land during the course of salt manufacture are an occasional ploughing at the beginning of the season to destroy crab holes and subsequent stamping down of the soil to make it hard and prevent percolation of the brine. I do not consider that these processes warrant a finding that the income is derived from the land. The land comprising the salt pans is merely a place of storage of the commodity, viz., sea water, which yields the income."

M. Patanjali Sastri, Special Counsel for Referring Officer.

T. V. Venkatarama Aiyar for respondent.

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS :—*The Chief Justice*:—In my opinion this case is unarguable. The assessee was a licensee of the Krishnapatam Salt Factory in the Nellore District From the manufacture of salt on the land of which he was the lessee he made a profit of some Rs. 7,000 which has been assessed to income-tax. He now contends that this is agricultural income, that it is revenue derived from the land which is used for agricultural purposes and therefore not taxable. To my mind it would be a gross misnomer to hold that "agricultural purposes" could be held to cover the process of flooding the land occupied by letting in the sea water and then extracting the sodium chloride from it by eliminating the other chemical constituents. In my opinion the assessment was right and must be confirmed. The answer to the specific question referred is in the negative. The assessee will pay the costs of this reference. Counsel's fee Rs. 250.

Wallace, J. :—I agree.

Beasley, J. :—I agree.

N. S. *Reference answered in the negative.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, Kt., *Chief Justice*, MR. JUSTICE WALLACE AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax ... *Referring Officer.**

v.

A. T. K. P. L. S. P. Subramaniam Chettiar ... *Respondent.*

F. B.
Commissioner of Income-tax
v.
Subramaniam Chettiar.

Indian Income-tax Act (XI of 1922), S. 4 (1)—Income arising in British India—Mercantile basis of accountancy—Amount shown as interest in

*Referred Case No. 8 of 1926. 4th May, 1927.

F. B.

Commissioner of Income-tax v. Subramaniam Chettiar.

accounts—Liability to income-tax—Actual receipt of amount if necessary—Assessee adopting mercantile basis of accountancy—Income-tax on cash basis—Plea of, by assessee—Right of.

Petitioner was a banker resident at a place *S* in the Ramnad district. He carried on banking business at *S* and also at Rangoon. These businesses belonged solely to him, that at Rangoon being managed by an agent acting under his orders. He was also the chief partner in a money-lending firm at Penang in the Strait Settlements.

From the Rangoon firm under petitioner's orders a sum of Rs. 78,000 and odd was transferred in cash to the Penang business and a sum of Rs 12,000 and odd was entered in the books of the Rangoon business as interest on that money from Penang. The petitioner maintained his accounts on the mercantile basis, according to which method credits and debits were entered in the accounts not on the basis of the actual receipts and disbursements in the course of business but on the date of the transactions irrespective of the date of payment. The sum of Rs. 78,000 and odd was treated as an advance in petitioner's accounts, and the interest on that sum was treated as interest on that advance in just the same way as all other interest was treated as interest on loans made to others. Interest chittas were actually sent to Penang in respect of that interest.

Held that, in view of the mercantile basis of accountancy voluntarily adopted by the petitioner, the interest on the Rs 78,000 and odd was income which properly arose in British India within the meaning of S. 4, Sub-section (1) of the Indian Income-tax Act.

Under the Act a trader can adopt either the mercantile basis of accounting or the cash basis. He cannot adopt both. He cannot also for the purpose of more conveniently carrying on his own business adopt the mercantile basis and then for the purpose of income-tax assessment adopt the cash basis.

Case stated under S. 66 (3) of Act XI of 1922 in pursuance of the order of the High Court in O. S. A. No. 89 of 1924 dated 12th January, 1926 calling on the Commissioner to refer the question of law in the case to the High Court.

The Case stated by the Commissioner of Income-tax, Madras, was as follows:—

"In compliance with the above order, I have the honour to refer the following case for the opinion of the Hon'ble Judges of the High Court.

2. The petitioner is a banker resident at Sirukudalpatti in the Ramnad district. He carries on banking business at Sirukudalpatti and also at Rangoon. These businesses belong solely to him, that at Rangoon being managed by an agent acting under his orders. He is also the chief partner in a money-lending firm at Penang in the Strait Settlements.

3. The petitioner is maintaining his accounts on the commercial or mercantile basis. According to this method credits and debits are entered in the accounts not on the basis of the actual receipts

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and disbursements in the course of business but on the date of the transactions themselves irrespective of the date of payment. The profits and gains of an assessee who keeps his accounts on the mercantile basis are arrived at by a comparison of the figures on the credit and debit sides at the opening and closing dates of the year of account in respect of the transactions of the business. S. 13 of the Income-tax Act, 1922, requires that an assessee's income shall be calculated in accordance with the method of accounting regularly employed by him.

4. For the assessment of the year 1923-24 (which had to be computed on the basis of the income of the year 1922-23) the petitioner returned an income of Rs. 16,345 and filed a Profit and Loss statement certified by an auditor showing his income for the 12 months ending 12th April, 1923 as under:—

			Rs.
Headquarters, Sirukudalpatti		...	2,478
Rangoon old account	Rs. 17,367		
Rangoon new account (loss)	4,578	...	12,789
Profit received from Penang partnership		...	1,078
	Total	Rs.	16,345

Subsequently the auditor filed a revised Profit and Loss statement for the Rangoon old account in which he showed the income to be Rs. 20,507 instead of Rs. 17,367. He arrived at this figure of Rs. 20,507 after deducting from the gross income receipts as shown in the accounts a sum of Rs. 6,313 which he alleged was "interest adjusted on the loan advanced to the Penang Shop but not received". Some time later he put in another claim to deduct a sum of Rs. 5,861 being the interest adjusted to the profit account on the loan advanced to the Penang partnership but not actually received in British India. In calculating the profits of the Rangoon old account the auditor had, however, deducted as expenses many items of interest payable to foreign creditors although the interest had not been paid.

The Income-tax Officer heard the petitioner's representative on the claim to deduct the two sums of Rs. 6,313 and Rs. 5,861 or Rs. 12,174 in all and held that as the loans were advanced in Rangoon the interest accrued and arose to the petitioner in British India and as that interest was taken credit for in the petitioner's Rangoon accounts which were maintained on the mercantile basis, it was liable to be assessed under Ss. 4 (1) and 10 read with S. 13 of the Income-tax Act. He therefore took all credits in the accounts as receipts and allowed all debits in the accounts as expenses and after adding back certain expenses which were inadmissible under the Act assessed the total income of the petitioner at Rs. 39,748 as shown under and levied an income-tax of Rs. 3,105-5-0.

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		Rs.
Property	...	1,587
Business, headquarter	...	2,629
" Rangoon old account	...	38,946
Remittances from Penang	...	1,078
		Rs. 44,240
Deduct loss from Rangoon new account	...	4,492
Total income		Rs. 39,748

5. The petitioner appealed to the Assistant Commissioner against this assessment and contended *inter alia* that the interest of Rs. 12,174 credited in the Rangoon accounts on the loan to the Penang firm represented "income in the shape of interest due from Penang" and that, as "there has been no payment towards this income" and "Penang is still a debtor to Rangoon", the adjustment of this interest in the Rangoon books could not be construed as the receipt of the income into British India for purposes of assessment. Extract from his appeal petition is filed as Ex. A. The Assistant Commissioner, however, upheld the assessment on the grounds that the sum advanced by his Rangoon shop to the Penang firm was, as admitted by the petitioner, a loan on which interest accrued, arose and was payable in British India, that as the petitioner took credit in his books for the interest due, the interest should be taken to have been realised according to the method of accounting adopted by him and that, as the interest did not accrue in the foreign country, the question of remittances of foreign profits did not arise. An extract of the Assistant Commissioner's order is filed as Ex. B.

6. The petitioner then filed an application to the Commissioner under S. 66 (2) of the Income-tax Act and contended that the sum advanced by his Rangoon shop to the Penang firm was not a loan made in the regular course of the Rangoon business but a surplus investment made by him in a joint business at Penang in which he was a partner, that the interest on this sum accrued in Penang and that, as it was not actually remitted to British India, it could not be taxed here. In support of his position he produced certain letters to show that the amount, though originally advanced by his Rangoon shop, was really an investment by the headquarters in the Penang business the interest on which was payable to the headquarters and not to Rangoon. A copy of the application is filed as Ex. C. This position was entirely inconsistent with that taken up at the time of the assessment and of the appeal before the Assistant Commissioner when he admitted that the money sent from Rangoon to Penang was a loan in the regular course of business. It was also inconsistent with the entries in the accounts which showed that the amount due by Penang was on current account with Rangoon, that the Rangoon shop took credit for the

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interest on this amount and that the Penang firm showed payment of interest on the same amount to the Rangoon shop and not to the headquarters though there was a separate ledger in the Penang accounts for transactions with headquarters. The Commissioner doubted the genuineness of the correspondence between the petitioner and his Rangoon agent in regard to the transfer of the money from the Rangoon to headquarter account, and held that even if the letters were genuine they merely embodied an idea of the petitioner, which the books showed had not been carried out. The balance sheet of the Rangoon shop (a copy of which is filed as Ex. D) no doubt indicated that the petitioner had sufficient capital of his own to cover the amount alleged to have been transferred to Penang on headquarter account but there was no proof that the money was so transferred. On the other hand all the circumstances indicated that the advance was a 'loan' advanced by Rangoon to Penang as previously admitted by the petitioner. During the hearing of the application the Rangoon and Penang accounts and the Rangoon Vaddi Chittas were produced and examined by the Commissioner's Personal Assistant and by the then Assistant Commissioner, Central Range. They have noted that the Vaddi Chittas were prepared and sent from Rangoon to Penang. Petitioner's vakil now denies this, but the copy of the Penang ledger in the Rangoon accounts supports their statement as the interest is entered "Vaddi Chittaipadi" which implies that vatti chittais had been interchanged. I accordingly accept the statements of the then Personal Assistant and Assistant Commissioner as correct. Further, in the affidavit filed by the Commissioner during the hearing of the application under S. 66 (3) it was specifically stated that Vaddi Chittas had been issued by Rangoon and accepted by Penang. That allegation was not definitely denied by the petitioner in his second affidavit. On the facts before him, the then Commissioner rejected the new theory put forward by the petitioner and refused to state a case to the High Court (Ex. G). The facts found during these proceedings are summarised below:

(*a*) that the petitioner's business was carried on in British India;

(*b*) that the loans on which the interest of Rs. 12,174 accrued was made by the petitioner from Rangoon and the accounts showed that it arose on the current account of the Rangoon shop with the firm in Penang;

(*c*) that the interest was adjusted in the Rangoon accounts as a receipt from Penang and the Penang accounts also showed payment of interest on this amount to the petitioner's Rangoon shop although the entries were made on different dates and for slightly different periods;

(*d*) that the petitioner's Rangoon accounts are kept on the mercantile basis according to which the interest due is treated as receipts irrespective of actual realisation;

(*e*) that Vatti Chittais were interchanged between the Rangoon and Penang agents and that the entries were made in Rangoon after they had been accepted by Penang;

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(*f*) that in accordance with the mercantile basis the debit entries made on account of interest due by the petitioner to his creditors in foreign places were treated as payments though the interest had not actually been paid and such debits were allowed as an expenditure in computing the profits of his Rangoon shop.

7. An application under S. 66 (3) of the Indian Income-tax Act was made to the High Court to direct the Commissioner to state a case on certain questions of law which he alleged arose in his assessment. The application was heard by the Hon'ble Mr. Justice Kumaraswami Sastri. In the course of the proceedings before him he called upon the Assistant Commissioner, Southern Range, to examine petitioner's accounts and record definite findings on the question whether, having regard to the entries in the accounts and the course of business, there was only a book adjustment of the interest or anything amounting to payment of interest by the Penang firm to the petitioner's Rangoon business. The Assistant Commissioner examined the books and recorded the findings, a copy of which is filed as Ex. E. On these findings of fact the High Court held that no question of law arose and dismissed the application. The order is filed as Ex. F.

8. The petitioner filed an appeal against this order in O. S. A. No. 89 of 1924. Their Lordships who heard the appeal considered that questions of law were involved and by their order dated the 12th January, 1926 (received by me on 22nd February 1926) I have been directed to refer the following questions of law with my own opinion thereon for the decision of the High Court:—

"1. In the circumstances of this case can the interest on the loans or advances made by the assessee to the partnership firm at Penang be said to be income accruing or arising in British India within the meaning of S. 4, cl. (1) of the Indian Income-tax Act ?"

"2. If the answer to the above question is in the negative and if the income is one accruing or arising without British India to a person resident in British India is the income one received in British India so as to make it taxable under S. 4 read with Ss. 6, 10 and 13 of the Act ?"

9. *Question* (1).—On the findings of fact by the Income-tax authorities, summarised at the end of paragraph 6, I am of opinion that it must be held that the interest on the sum of Rs. 67,000 sent to Penang is income accruing or arising in British India. We are not taxing the profits made by the Penang firm through lending out in Penang the capital borrowed from Rangoon. What we are taxing is the interest due to the petitioner's Rangoon shop from his partnership firm at Penang on the loan given by petitioner at Rangoon. I know of no justification for the view that the loans made by a banker in British India must be dealt with separately according as the borrower is in British India or outside British India. Any Bank in British India in computing its taxable profits would certainly make no distinction between loans lent to a merchant in Madras and loans lent to a planter in Travancore.

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Question (2).—I am of opinion that the sum of Rs. 12,174 is one received in British India within the meaning of Ss. 4, 10 and 13 of the Act. In Referred Case No. 2 of 1920 [*The Secretary to the Board of Revenue (Income-tax), Madras* v. *Al. Ar. Rm. Arunachalam Chettiar* (1)] the effect of the words "income accruing, arising or received in British India" occurring in S. 3 of the Income-tax Act VII of 1918 (which was repealed by the present Act XI of 1922) came up for judicial consideration before a Full Bench of five Judges of the Madras High Court. Justice Napier held "If a person entitled to receive money agrees with his debtor to let the money stand in the hands of the debtor either by way of deposit or as a fresh loan of investment that would in my opinion amount to receipt". Justice Ayling said "I agree with Napier, J., that if a person entitled to receive interest agrees with his debtor to let the money stand in the hands of the debtor either by way of deposit or as a fresh loan or investment that would amount to a receipt". Justice Krishnan remarked "Actual payment of cash by the payer to the payee is of course not necessary to constitute a receipt or realisation. Payment by a Bank of interest earned by a fixed deposit to a person's current account in the Bank itself would also amount to a receipt by him. Again in the case, put by the Board, of a Nattukottai Chetti not drawing the interest that has accrued to him but leaving it with the payer to be added to the capital and to carry interest itself would also be a case of realisation in the view I am taking." Similar views were expressed by Justice Sadasiva Aiyar. In this case the petitioner as well as his creditor the Penang partnership are both bankers. The petitioner prepared and issued vaddi chittas to his debtor the Penang partnership and on acceptance of the same by his debtor took credit for the interest due in his Rangoon business accounts. The Penang partnership gave credit to the petitioner for the interest on this amount in its own accounts and interest is being calculated on the capital *plus* the interest credited thereon. In other words, the petitioner instead of receiving the interest in British India and re-transmitting it to Penang managed to get a corresponding credit for his business in British India by an adjustment in the accounts. Such an adjustment has the same effect as actual receipt.

Further in the Rangoon business there were both interest due from persons resident outside British India but not actually received and interest due to persons outside British India but not actually paid. The petitioner has in his accounts taken credit for interest due to him and debited the accounts on interest payable by him. As stated in paragraph 3 above the petitioner is maintaining his accounts on the mercantile basis so that under the explanation contained in S. 10 (3) the interest debited to the accounts though not actually paid has been allowed as an expenditure. I am of opinion that the interest credited to the accounts in accordance with the method of accountancy employed by him must in the same way be

1. (1920) 39 M L J 649 (F B).

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taken to have been received by him within the meaning of S. 4 read with Ss. 10 and 13 of the Income-tax Act. Any other conclusion will make it impossible to assess foreign traders on the mercantile basis. If in the present case, for example, the result of adopting the mercantile system of accountancy is to be that amounts debited but not paid must be treated as outgoings while amounts credited but not received in cash and standing on primarily the same footing as the debits cannot be treated as incomings, the assessing officer could hardly avoid the conclusion that in the circumstances the assessee's income, profits and gains could not be deducted from accounts maintained on the mercantile system of accountancy, and he would have to exercise his discretion under the proviso to section 13 of the Act and compute the income on some other basis."

M. Patanjali Sastri, Special Counsel, for Referring Officer.

K. S. Krishnaswami Aiyangar for *M. Subbaroya Aiyar* for respondent.

The judgment of the Court was delivered by

Beasley, J.

Beasley, J. :—Two questions are referred to us for decision: (1) In the circumstances of this case can the interest on the loans or advances made by the assessee to the partnership firm at Penang be said to be income accruing or arising in British India within the meaning of S. 4, cl. 1 of the Indian Income-tax Act, and (2) If the answer to the above question is in the negative and if the income is one accruing or arising without British India to a person resident in British India, is the income received in British India so as to make it taxable under S. 4 read with Ss. 6, 10 and 13 of the Act.

The assessee has a business of his own in Rangoon carried on by an agent and is interested with another or others in a money-lending business in Penang in which he is the chief partner. From the Rangoon business under his orders a sum of Rs. 78,768-7-3 was transferred in cash to the Penang business. In the books of the Rangoon business a sum of Rs.12,174 is entered as interest on that money from Penang and the assessee has in respect of that interest been assessed under S. 4, Sub-section 1 of the Indian Income-tax Act as income accruing, arising or received in British India. The assessee contends that interest so credited in the Rangoon books is interest earned outside British India, that is foreign income and that the crediting of interest in the Rangoon books is merely a book entry and that there has in fact been no actual receipt of the money in Rangoon and that therefore it is not income arising under S. 4, Sub-section 1 of the Indian Income-tax Act and is not income

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arising under S. 2, Sub-section 2 of the same Act because it has never been received in British India. The short answer to that contention in our view is that this interest is not a profit or gain arising without British India. The Income-tax Commissioner does not seek to tax anything that the Rs. 78,768 may have earned in Penang. What he has done is to assess the profits of the Rangoon business under S. 10 of the Indian Income-tax Act computed in the manner directed by S. 13 of the same Act. S. 13 was no doubt introduced to obviate many difficulties. It is a great advantage to both traders and Income-tax Officers. It is open to a trader to adopt either the mercantile basis of accounting or the cash basis. He is not forced to adopt one in preference to the other but he cannot adopt both. The assessee in common with most of the business firms in India has chosen to adopt the mercantile basis of accountancy and not the cash basis. He cannot, for the purpose of more conveniently carrying on his own business, adopt the mercantile basis and then for the purpose of income-tax assessment adopt the cash basis. What is done in accordance with the mercantile basis is that the debit entries made on account of interest due by the assessee to his creditors in foreign places are treated as payments of interest though interest has not actually been paid and such debits are allowed as an expenditure in computing the profits of the assessee's business in British India Similarly credit entries made on account of interest due by creditors in foreign places to the assessee are treated as payments of interest though that interest has not actually been paid and admittedly in this case this basis has been adopted and no question as to whether or not interest has actually been received or has actually been paid can under this basis possibly arise. What the assessee seeks to do is, whilst adopting the mercantile basis in regard to all the other entries of interest in his accounts, to adopt an entirely different basis, *i. e.*, cash basis for the purpose of this one entry and to argue that interest has never been received in British India although it is entered as a profit in exactly the same way as all the other credits of interest are, all the other entries being treated on the mercantile basis as money actually received The assessee has chosen to adopt the mercantile basis His own accounts are dead against him and, in our view, preclude him from arguing here, as he does, that this interest is income arising outside British India, and not received in British India because in law the transfer called in the assessee's books an advance to the Penang

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firm cannot be a loan. In our view once an assessee has adopted the mercantile basis of accountancy it is upon that basis and upon that basis alone that he is to be assessed. It would be an impossible position if an assessee after having adopted the mercantile basis were to call upon the Income-tax Officers to make a long and difficult inquiry with regard to the various items entered as profits in the accounts of the assessee in order to prove that those sums were actually received in British India. This interest is treated like all the other interest in the assessee's books as a receipt of profits. The money transferred is treated as an advance. The interest is treated as interest on that advance in just the same way as all other interest is treated as interest on loans made to others. Not only that, interest chittas were actually sent to Penang in respect of this interest. The case of *The Gresham Life Assurance Society* v. *Bishop* (2) was referred to by the assessee as a case in support of his contention But that case has no application to this case as that was a case of a foreign income whereas in this case on the facts, that is to say the mercantile basis of accountancy voluntarily adopted by the assessee, the interest is income which properly arises under S.4, Sub-section 1 of the Indian Income-tax Act. Our answer to the first question referred to us is in the affirmative and in view of this answer the second question does not arise. The assessee will pay the costs of this reference Rs. 250 to the Commissioner of Income-tax.

A. S. V. *Reference answered in the affirmative.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT :—VISCOUNT DUNEDIN, LORD SHAW, LORD SINHA AND SIR JOHN WALLIS.

V. E. A. R. M. Firm and another ... *Appellants** (*Defts.*)

v.

Maung Ba Kyin and another ... *Respondents* (*Plaintiffs*).

P. C.

V.E.A.R.M. Firm v. Maung Ba Kyin.

Civil Procedure Code, 1908, O. 21, R. 63—Claim to attached property, preferred by party holding under registered sale-deed—Regular suit to establish right—Burden of proof.

Where a party being the ostensible owner of property under a registered sale-deed passed by the judgment-debtor, prefers a claim to the said property on its attachment in execution of a decree against the judgment-

*P C Appeal No. 85 of 1926. 1st July, 1927.

2. (1902) A C 287.

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debtor, and, upon the claim being disallowed, he institutes a suit under O. 21, R. 63, Civil Procedure Code, 1908, to establish his right, the *onus* is on the contesting defendant, namely, the attaching decree-holder, to show that the sale by the judgment-debtor to the plaintiff was a fraudulent one.

Semble : The Court may legitimately infer fraud from an utter inadequacy of consideration.

Judgment of the High Court affirmed.

Appeal (No. 85 of 1926) from a judgment and decree of the High Court, Rangoon (Das and Heald, JJ.), dated the 4th August, 1925, reversing a decree of the District Judge of Myaungmya, dated the 23rd June, 1924.

The material facts are given in the judgment of the Judicial Committee. The case of the plaintiffs was that they bought the properties in suit from the judgment-debtors for Rs. 20,000 by a registered sale-deed dated the 31st July, 1922, and that they had been in possession since. The attaching creditor contested the suit and pleaded that the sale-deed was a fraudulent one without consideration and intended to delay and defraud creditors. The Trial Court dismissed the suit on the ground that the sale to the plaintiffs was not a genuine one and was made to defraud the creditors of the judgment-debtor. On appeal, the High Court took the contrary view and decreed the plaintiffs' suit. The following extracts from the judgment of the High Court put the case in a nut-shell:—

"We do not agree with the Trial Court on this point. It is not alleged in this case that the land is worth more than Rs. 18,000 or Rs. 19,000. The main consideration for the sale in July, 1922 was the debt due to Upe, Ba Kyin's father. At that time there were no suits instituted against Mg. Po Hla, and there was nothing to prevent Upe from pressing Mg Po Hla in either getting repayment or a conveyance of the land Upe states that he was anxious to get this land for his son, and that he was therefore willing to pay a few thousand rupees more to get a conveyance of it. The Trial Judge seems to have considered that, because the conveyance was not taken in the name of Upe, but in that of his son, therefore the transaction must be a sham one. To our mind that makes no difference. Upe was at liberty to take a conveyance in his own name or in that of any one he liked. It is quite possible that he might have wanted to favour his only son, and therefore took the conveyance in his son's name. There is no reason to disbelieve the statement of Upe when he says that his idea was to give this land to his son, and that therefore he took the conveyance in the name of his son. The burden of proving want of consideration is on the defendants. The land was sold before the attachment, and they had to prove that the sale was not a genuine one and that there was no consideration for it. The defendants have produced no evidence to show want of consideration or anything to affect the *bona fides* of the sale. They have not attempted to show that the land was worth more than Rs. 20,000,

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the consideration paid for the land. On the other hand, the plaintiffs have produced evidence to show that Rs. 3,000 was paid at the time of the sale, and that Rs. 17,000 was due on the original loan at that time. As already stated, the Trial Judge has held that Rs. 15,000 has been loaned to Po Hla by Upe. Under these circumstances we are of opinion that the burden of proof lay very heavily on the defendants to show that the deed of sale was not a genuine one. It is not alleged that at the time of the deed of sale Upe or his son knew the state of indebtedness of Mg. Po Hla. We therefore set aside the decree of the Lower Court, and decree the plaintiffs' suit with costs in both Courts."

The defendants (the attaching decree-holders) appealed to His Majesty in Council from the judgment of the High Court, and contended that the conveyance in favour of the plaintiffs was void under S. 53 of the Transfer of Property Act as made without consideration and with intent to defeat the vendor's creditors.

Dunne, K. C., and *Raikes* for appellants.

The respondents were not represented at the hearing.

1st July, 1927. The Judgment of their Lordships was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN.—In September, 1920, one Po Hla, who was proprietor of certain real property, executed a mortgage of that property in favour of Upe for Rs. 10,000. At the same time, he also executed a promissory note in favour of Upe for Rs. 5,000, and what has been said in the judgments below may be anticipated by saying that it has been found that these transactions were quite genuine transactions and represented a mortgage and a promissory note executed for a real debt. Now time went on and inasmuch as interest had not been paid, when it comes to the critical date with which we shall have presently to do, the state of affairs was this, that these Rs. 10,000 and Rs. 5,000 respectively had with interest grown into a sum of Rs. 17,000, of which, of course, only part was under the mortgage and the other was merely an ordinary debt.

Now in 1922, Po Hla executed a deed of sale to Maung Ba Kyin and Ma Sein Ba Kyin was the son of Upe, his creditor, and Ma Sein* was his own daughter. It is quite evident that the idea of this transaction was that Upe, in respect that it was his own son, was willing that his debt of Rs. 17,000 should be taken as part consideration of the price to be paid. The price agreed upon was Rs. 20,000, and it seems quite clear on the transaction that the Rs. 17,000 was quite rightly taken as consideration, leaving, of course, the Rs. 3,000 to be paid in cash.

* Ma Sein was the wife of Ba Kyin.—K. J. R.

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Now in the meantime, in 1921, Po Hla had executed a promissory note for Rs. 12,000 in favour of the Chetty firm, who are the appellants in this action, and the proceedings in the matter began by this Chetty firm suing upon the promissory note and then proceeding to put an attachment on what may be called Po Hla's old property. These two, the husband and the wife, who were the ostensible owners of the property, being owners in respect of a duly executed and registered deed of transfer, put in a claim under O. 21, R. 58, to have the attachment removed, and, having failed, instituted the present suit under O. 21, R. 63, to establish their right.

Now they being the ostensible owners of the property under a duly registered deed and a deed of transfer, obviously the party claiming to attach that property for somebody else's debt, not their debt, but the debt of the original debtor, must show that the sale was a fraudulent one, and that could only be done in this case (there is no other evidence) by showing utter inadequacy of consideration. So far as the Rs. 17,000 was concerned, there was adequacy of consideration. Therefore, there only remains the Rs. 3,000. No doubt the evidence is in a very ragged condition as to precisely where and when that money was paid and, if it was necessary to show it was paid in hard cash, probably such proof would fail. But their Lordships take this view, that supposing that it was not established, inasmuch as it has been held by the Judges below that the total value of the property was only Rs. 20,000, this Rs. 17,000 being an absolutely good consideration, the remaining Rs. 3,000 is not enough to allow them to draw the conclusion that it was a fraudulent sale.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal. The appeal has been heard *ex parte*, so there will be no order as to costs.

Solicitors for appellants : *Bramall & Bramall.*

K. J. R. *Appeal dismissed.*

[*Reporter's Note.*—After the dismissal of a claim, where a regular suit is instituted to set aside the order made on the claim petition, it is for the plaintiff in that suit, *i. e.*, the defeated claimant, to establish that he is the owner of the property, and it is not sufficient for him to merely rely upon the deed which shows his ostensible title (see, *inter alia*, *Nannhi Jan* v. *Bhuri*, (1908) I L R 30 A 321; *Perayya* v. *Venkayamma*, (1924) 47 M L J 14).

Quaere: Whether these decisions are affected by the above pronouncement of the Judicial Committee?—K. J. R.]

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT :—VISCOUNT DUNEDIN, LORD SHAW, LORD SINHA AND SIR JOHN WALLIS.

Sardar Gurbaksh Singh ... *Appellant** (*Defendant*)

v.

Gurdial Singh and another ... *Respondents* (*Plaintiffs*).

P. C.

Sardar Gurbaksh Singh v Gurdial Singh.

Party personally knowing all facts—Duty to give evidence on his own behalf and to submit to cross-examination.

It is the bounden duty of a party, personally knowing the whole circumstances of the case, to give evidence on his own behalf and to submit to cross-examination. His non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case.

Observations of Lord Atkinson in *Lal Kunwar* v. *Chiranji Lal,* (1909) L R 37 I A 1 : I L R 32 All. 104 . 20 M L J 182 (P C) relied on.

[See also *Kishori Lal* v. *Chuni Lal,* (1908) I L R 31 All 116 · 19 M L J 186 (P. C.).—K. J. R.]

Judgment of the High Court reversed.

Appeal (No. 112 of 1925) from a judgment and decree of the High Court, Lahore (Martineau and Moti Sagar, JJ.), dated the 9th April, 1924, reversing a judgment of the Subordinate Judge of Ludhiana, dated the 1st December, 1919.

The plaintiff Gurdial Singh sued for a declaration that he was the lawful son of Sardar Jawala Singh, a Jaghirdar, who died on the 19th August, 1915. Jawala Singh had two wives, Bhagwan Kaur and Harnam Kaur, and the plaintiff's allegation was that he was the son of Bhagwan Kaur and was born in October, 1915. The defendant Gurbaksh Singh, a half-brother of Jawala Singh, denied that Bhagwan Kaur gave birth to any child after her husband's death. The Subordinate Judge dismissed the suit, finding that the plaintiff was not proved to be the son of Bhagwan Kaur. On appeal, the High Court reversed the judgment of the Subordinate Judge and passed a decree declaring that the plaintiff was the lawful son of Jawala Singh, deceased. The defendant Gurbaksh Singh appealed to His Majesty in Council against the judgment of the High Court.

The material facts are stated in their Lordships' judgment. The main question for determination in the present appeal was one of fact, namely, whether the plaintiff Gurdial Singh was

*P C Appeal No. 112 of 1925. 19th July, 1927.

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the son born of Bhagwan Kaur, the widow of Jawala Singh, or a spurious child.

Dunne, K. C. and *Dube* for appellant.

De Gruyther, K. C. and *Parikh* for respondents.

19th July, 1927. The Judgment of their Lordships was delivered by

Lord Shaw.

LORD SHAW :—This is an appeal against a judgment and decree dated the 9th April, 1924, of the High Court of Judicature at Lahore, which reversed the judgment and decree of the 1st December, 1919, of the Subordinate Judge at Ludhiana.

Sardar Jawala Singh was a jaghirdar possessed of certain properties in the Ludhiana and Ferozepore districts of the Punjab. He lived in the village of Bhikki Khatra, in the Ludhiana district.

Jawala died on the 19th August, 1915, leaving two widows. The elder, Harnam Kaur, was childless. The younger, Bhagwan Kaur, had borne to him a daughter, who at the date of his death was ten years old. These constituted the household.

It is admitted that according to the law in operation in that part of the Punjab, if there had been a son in the household, he would have succeeded to the properties; but that, failing a son, and there being only a daughter, the estate would fall to a collateral male relative. That relative was a step-brother named Gurbaksh Singh, who is the present appellant. If, however, a posthumous son was born, then that posthumous son would, of course, succeed, the household would be kept together, and Gurbaksh, the step-brother, would have no rights.

The story of this litigation, and of various other proceedings, partly legal and partly administrative, which preceded it, hangs upon the question whether such a posthumous son ever was born. It appears clear that a possible attempt to procure a spurious son was in the minds of all parties from the moment of Jawala's death, or even before that. He died on the 19th August, 1915.

The appellant maintains that no such posthumous son was born. Almost immediately after the death he proceeded to raise the question. Simultaneously, or almost simultaneously, Bhagwan, the younger widow, disappeared.

Every day was of importance for the defeat of a plot, if plot there was, and for the immediate discovery of the truth. There seems to be little doubt that dissatisfaction arose as to the

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delay of the Patwari of the village in taking action. It is a fact that the death having occurred on the 19th August, the Patwari only entered the fact in his diary so late as the 29th August.

In the Mutation Register, which purports to be dated the 23rd August, 1915, but which was only in reality completed on the 29th, there is in the last column the following entry:—

"To-day, Bachittar Singh, a co-sharer of Mauza Attari, stated:—

"Jowala Singh, a co-sharer and jaghirdar of Mauza Attari, died sonless on the 19th August, 1915. Mussammats Harnam Kaur and Bhagwan Kaur, his widows, are entitled to succeed to the property left by him in equal shares. A report regarding the death with regard to the jaghir has been separately submitted to the Tahsil. Hence the mutation entry relating to the khata is submitted.

"He also states that Mussammat Bhagwan Kaur is pregnant.

"Dated the 23rd August, 1915.

(Sd.) "BACHITTAR SINGH,
Declarant."

There remains in the case very considerable doubt as to when the words, "He (Bachittar Singh) also states that Mussammat Bhagwan Kaur is pregnant," were entered. As will be shown, Bachittar Singh, the alleged informant, was not examined as a witness.

On the 31st August, Gurbaksh, by a petition to the Mutation Officer, claimed that the property was his. By this time the parties were undoubtedly at arm's length. Gurbaksh, the step-brother appellant, had applied to the Collector; the application has not been found, but at least by the 14th September an application was lodged which frankly made the charge of the attempt to procure a spurious son:—

"In our family there is a custom that when a member died sonless his collaterals get his jaghir, and his widows are entitled to get maintenance only. They support themselves with the income of the ancestral land. The village Patwari has colluded with his (deceased's) widow. He made a false and fictitious report in the mutation register to the effect that Mussammat Bhagwan Kaur is pregnant, whereas she is not at all pregnant. Our rights are prejudiced owing to collusion with the Patwari. Mussammat Bhagwan Kaur (she was the second and much the younger of the two widows) may be got medically examined by a doctor so that she may not procure a spurious son. If she procured a son somewhere or is trying to procure a son, we do not accept him. It is therefore prayed that local enquiry may be got made by a Tahsildar and relief granted."

This challenge should, as was meant, have brought matters to a head. The request made was reasonable. The condition of Bhagwan was the critical and conclusive fact in the case.

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Without any doubt whatsoever she should have appeared, if her case was true; her condition of advanced pregnancy would have been plainly enough established in the course of that enquiry. She did not so appear. The proceedings were delayed. The Deputy Commissioner on the 13th October demanded to know what had become of the matter.

Meantime events ripened, or were alleged by the elder widow to have ripened, by the alleged birth of a son to Bhagwan in a remote village of an adjoining Native State.

Gurbaksh at once took action, and on the 21st October another application was made to the Collector, which narrated as follows:—

"After his death Mussammat Bhagwan Kaur, in order to prejudice my rights, gave out, in consultation with the village Patwari, that she was pregnant, whereas she was not at all pregnant. I filed applications in your Court praying that enquiry may be got made at the spot or the woman may be got medically examined, but up till now no attention has been paid to those applications."

Then follows the second stage of the case:—

"But a short time ago Mussammat Harnam Kaur (that is, the elder widow) gave out that a son was born, whereas no son was born, nor is it known where was Mussammat Bhagwan Kaur, nor yet did she tell on what date and in which village the son was born. This is all fraud."

This is the one side, namely, the step-brother's allegation. It is, however, interesting to know what was the admitted attitude of the widows themselves upon the important subject of the possibility of a spurious son.

In the application before the Collector, Mussammat Harnam Kaur, the elder widow, made the following statement on the 25th October, 1915:—

"The name of my co-wife is Mussammat Bhagwan Kaur. Our husband died about two months ago;"

and then there follow these words:—

"About a month after his death, I sent her to my parents' house for the reason that she might, perhaps, give birth to a daughter and might go to her parents' house and secure a spurious son in order to prejudice my rights."

This is a curious statement, but in some respects it has obvious importance. It shows that the departure from the family home was deliberate. Next, the disappearance was in the mind of this co-widow connected with the birth or the production of a son. Further, the elder widow was to manage the affair of the residence of the younger.

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This deliberate design was followed by the departure of the second widow, who went off in the first place to her own parents' house. This was natural and usual: but she was only there a day or two when she was taken therefrom by a nephew of the first widow, and immediately thereafter to Patiala, outside British territory and in a Native State. Not content with this, she was again removed by him from Patiala to his own residence at a place called Lakha Singhwala, in Nabha, also a Native State. This nephew states that his aunt Harnam wished him to take Bhagwan from Patiala to Lakha Singhwala in order to avoid the apprehended change from a girl to a boy.

The facts of these changes of residence are undoubted; but their Lordships do not believe a word of the story as to the object of the journey, or as to the absentee widow having borne a son.

The Board does not go into the details further than to say that it is satisfied with the interpretation put upon them by the Subordinate Judge. They think it true to say firstly, that the suggestion of an apprehended change from a girl to a boy is without any foundation whatsoever. Secondly, the deliberate removal from her home and even from the home of her own parents to these two different places in a foreign State was effected with the object of destroying traces of her whereabouts, of making it practically impossible compulsorily to secure her medical examination, of making it possible to lay a foundation for the fraud of obtaining a spurious son and of maintaining thereafter that in this remote place she herself had given birth to it. Their Lordships, in short, agree, on the whole of that part of the case, with the views of the Subordinate Judge.

One or two points, however, may be stated in addition. It was argued that the statement as to pregnancy attributed to Bachittar Singh was interpolated by the Patwari in the original record of the death of Jawala Singh. The challenge was made before the proceedings, either before the Collector or in this suit, were instituted, and it is striking and suspicious that Bachittar Singh, to whom this statement was attributed, was not called as a witness to clear up the point, or to state upon what information his alleged statement was made.

There may be very considerable doubt as to whether the statements made before the Collector, which truly did not form a part of the present *lis*, should have been admitted in these civil proceedings. The thing, however, was done. As already

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mentioned, the appellant took action almost at once to have the truth as to Bhagwan's condition investigated. She, however, disappeared, and it was practically impossible for a private litigant to fetch her back, or possibly even to ascertain her whereabouts. The investigation proceeded in the Collector's tribunal, and on the 12th November the Revenue Assistants reported to the Deputy Commissioner that the boy was fictitious.

It may be remembered, however, that there being a report circulated that Harnam was certain that a son was born, Gurbaksh instantly took action. By another application of the 21st October he requested that some high officer might be specially sent to the spot and a thorough inquiry made so that the true facts might come to light. The authorities could not use force beyond the British frontier, and in the course of the further proceedings on the 2nd February, 1916, the following order was pronounced by the Presiding Officer of the Revenue Court:—

"Mussammat Bhagwan Kaur is keeping out of the way and cannot be found. Sardarni Harnam Kaur be summoned to Ludhiana for the 21st February, 1916. Her whereabouts be inquired from Sardar Bahadur Sardar Gajjan Singh and Mr. Sarab Kishen. They state they do not know where the Sardarni Sahiba is, nor did any Mukhtar of her come to them again."

A last opportunity was given, but Bhagwan did not appear until the 3rd March, accompanied by a boy to which she maintained she had given birth in the previous October.

It appears clear to their Lordships that she was purposely keeping out of the way, not only from August, 1915, when she disappeared, but from October, when her alleged son was born. This further delay from October to March, about five months, was also deliberate. It was for the purpose of preventing the possibility of any medical examination of her after such a long period throwing light upon the question of the birth of a child by her in October. The Assistant Collector, however, heard her, and he was in no way moved by her evidence. "The statement," says he, "of Mussammat Bhagwan Kaur has been taken down. Even after hearing her I see no reason to alter my first view."

Further proceedings took place in the Revenue Courts, and then this civil suit followed. As already indicated, their Lordships see no reason to doubt either the great carefulness of the investigation made by the Subordinate Judge, or the soundness of the conclusions at which he arrived. The disappearance of Bhagwan, and the manifest approval of the co-widow; the re-

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fusal by her to come to the Court to submit to a medical examination, or even to remain for a reasonable period in her own old home, but in preference to go outside the jurisdiction of the Court and into a Native State, would in any view have thrown the greatest doubt upon the story of her having given birth to a son as alleged; and then the second feature of the case—her continued absence for a long period after the alleged birth—the whole of this appears to their Lordships to be but part of a transaction which was simply a nefarious plot.

It must be stated that in taking a different view the High Court went very far, as, for instance, when they say, "We do not find any proof that Bhagwan Kaur did, in fact, shirk examination."

Their Lordships think it unnecessary to repeat the numerous details of the story, but, as it involves a general and important question of procedure and practice, they think it expedient to make the following reference to what occurred at the trial of this civil suit. At the Bar of the Board it was admitted by the respondents that she, Bhagwan, had been present in Court when the evidence was being taken, and that she did not go into the witness box, and was not examined as a witness on her own or her alleged son's behalf.

Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manœuvre under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's, own witness.

This is thought to be clever, but it is a bad and degrading practice. Lord Atkinson dealt with the subject in *Lal Kunwar* v. *Chiranji Lal* (1) calling it "a vicious practice, unworthy of a high-toned or reputable system of advocacy."

The present case, however, is a pointed instance of the evils which flow from such a practice. Bhagwan's case had been the subject of prolonged investigation in the Revenue Courts, and had been pronounced by them a bogus case. She had appeared and told a story there, and it had not been believed. She was, however, also present in this civil suit, the issue in which was the legitimacy of the boy that she was putting forward as the Jaghir of the estate. Her non-appearance in answer to the challenge, that is to say, to disclose the actual

1. (1909) L R 37 I A 1 : I L R 32 A 104 : 20 M.L J 182 (P C).

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fact as to her condition shortly after her husband Jawala's death, her disappearance into a foreign State, and all the other circumstances mentioned, had been established. If her story were, notwithstanding all this, a true story, it was her bounden duty to give evidence in the suit, telling the whole facts in support of her and her alleged son's case; but she did not. If under advice she did not do so, that advice was of the worst description, and worthy of the animadversion above made. But in any view her non-appearance as a witness, she being present in Court, would be the strongest possible circumstance going to discredit the truth of her case.

How did the High Court deal with this? They say:—

"It is true that she has not gone into the witness box, but she made a full statement before Chaudhri Kesar Ram,* and it does not seem likely that her evidence before the Subordinate Judge would have added materially to what she had said in the statement."

Their Lordships disapprove of such reasoning. The true object to be achieved by a Court of Justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination.

To say that she would likely have repeated what she had already said omits the entire force of the consideration as to cross-examination, and their Lordships cannot doubt that if this part of the case had been treated from the point of view consistent with sound practice, as just stated, the High Court could never have reached the conclusion come to.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the judgment of the Subordinate Judge restored with costs here and below.

Solicitor for appellant : *H. S. L. Polak.*

Solicitors for respondents : *T. L. Wilson & Co.*

K. J. R. *Appeal allowed.*

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*Chaudhri Kesar Ram was the Assistant Collector, also known in the Punjab as Revenue Assistant.—K. J. R.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER AND MR. JUSTICE MADHAVAN NAIR.

Vobilineni Subba Rao and others ... *Appellants** (*Defts.*)

v.

Rajah of Pithapur and another ... *Respondents* (*Plff. and Deft. No* 1).

Subba Rao *v.* Rajah of Pithapur.

Madras Land Revenue Assessment Act (*I of* 1876), *S* 6—*Suit for declaration that suit lands should be separately registered in the name of a person—Essentials to be proved—Onus of proof.*

To establish a cause of action for a suit under S. 6 of the Madras Land Revenue Assessment Act to have it declared that the suit lands should be separately registered in the name of the second defendant, it is essential that the property which the plaintiff wishes to have separately registered should have once formed part of his permanently settled estate and should at the time of the suit belong to a different owner.

The question whether the income of the lands did or did not form part of the assets of the zemindari is a matter peculiarly within the knowledge of the Zemindar and of the Government and the burden of proof is on the Zemindar or Government. Even if the lands lie geographically within the limits of the zemindari, there is no presumption that, in settling the peishcush to be paid by the Zemindar under Regulation XXV of 1802, the income of all the lands in every village of the estate was taken into calculation.

As between the Zemindar and the Government, the *onus* of proving that any portions of the estate were reserved at the time of assessment might lie on the Government. But as between the Zemindar and other persons who were not privy to the settlement of the peishcush, the distribution of the *onus* of proof is different.

Second Appeal against the decree of the Court of the Additional Subordinate Judge, Cocanada, in A. S. No. 10 of 1922, preferred against the decree of the Court of the District Munsif, Ramachandrapur, in O. S. No. 143 of 1921.

G. Lakshmanna and *A. Satyanarayana* for appellants.

The Government Pleader for Government.

S. Srinivasa Aiyangar and *S. Venkatesa Aiyangar* for plaintiff-respondent.

The Court delivered the following

JUDGMENT :—The plaintiff, who is the Rajah of Pithapur, brought this suit under S. 6 of the Madras Act (I of 1876) (Madras Land Revenue Assessment Act) to have it declared that the suit lands should be separately registered in the name of the 2nd defendant. To establish a cause of action for a suit

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*Second Civil Appeal No. 404 of 1923. 9th November, 1926.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE VENKATASUBBA RAO.

Nagasubramania Mudali ... *Appellant** (*Respondent*)

v.

N. Krishnamachariar ... *Respondent* (*Petitioner*).

Naga-subramania Mudali *v.* Krishnama-chariar.

Provincial Insolvency Act (V of 1920), S. 7—Debt by Hindu father—Death of father—Suit against son—Decree against assets of the family—Alienation by son without satisfying decree—Son if can be adjudicated insolvent.

After the death of a Hindu father, a creditor of his filed a suit against his son and obtained a decree against the assets of the family. The son alienated the joint family properties without satisfying the decree. The decree-holder sought to adjudicate the son an insolvent.

Held that, as the son was not personally liable and as there was no personal decree against him, he could not be adjudicated an insolvent.

The Official Assignee of Madras v. *Palaniappa Chetty,* (1918) I L R 41 M 824: 35 M L J 473 referred to.

Muthuveerappa Chettiar v. *Sivagurunatha Pillai,* (1925) I L R 49 M 217: 49 M L J 697 distinguished.

Appeal against the order of the District Court of North Arcot at Vellore dated the 18th September, 1924 in I. P. No. 22 of 1923.

A. Viswanatha Aiyar for appellant.

A. C. Sampath Aiyangar and *V. C. Rajagopalachari* for respondent.

The Court delivered the following

JUDGMENTS :—*Odgers, J.* :—After a long delay of two years this Civil Miscellaneous Appeal comes before us again. We partially heard the Appeal in April 1925 and we then adjourned the hearing till a decision of the Lower Court had been reached as to whether the decree should be amended or not. That has now been done and a Civil Revision Petition against that decision has also been disposed of by us just now. This is an appeal against the decision of the learned District Judge of North Arcot adjudicating the petitioner insolvent. The father of the petitioner before us had incurred certain liabilities to the Commercial Bank and died and the petitioner as his son succeeded to the assets of his father. The learned District Judge held that the petitioning creditor having obtained a decree against the son as representing his father was entitled to have

Odgers, J.

*C. M. A. No. 382 of 1924. 25th April, 1927.

Naga-subramania Mudali v. Krishnama-chariar.

Odgers, J.

him adjudicated an insolvent. The matter seems to me to be very plain and can be dealt with shortly. It has been strenuously urged on us that the son is personally liable for the father's debt and therefore fulfils the definitions of a debt and debtor within the meaning of S. 2 (*a*) and (*d*) of the Provincial Insolvency Act and the decision in *Muthuveerappa Chettiar* v. *Sivagurunatha Pillai* (1) is pointed to. In that case one may say that the authorities do not seem to have been discussed and the learned Judges say that each case depends upon its own circumstances and if the petitioner makes the necessary allegations and proves them, then the Court would be justified in adjudicating the members of a joint Hindu family insolvents. That no doubt is perfectly true. But, on the other hand, in *The Official Assignee of Madras* v. *Palaniappa Chetty* (2) which was a case decided by three Judges of this Court after a difference of opinion between Abdur Rahim, Offg. C. J. and Phillips, J., the question was whether a minor partner in a Hindu trading family was liable to be adjudicated in respect of debts incurred for the purpose of the business during his minority or after he attained majority. The majority of the Court held that the members of a joint Hindu trading family on attaining majority do not necessarily become personally liable for, and liable to adjudication in respect of, debts contracted in the joint family business during their minority Sir John Wallis, C. J. in his judgment says that on the law he is not prepared to extend the operation of S. 248 of the Contract Act beyond the cases that directly fell within it so as to impose for the first time apparently on the members of the Hindu family a personal obligation for debts contracted in the family business during their minority, and with him Spencer, J. agreed. See also the observations in *Sanyasi Charan Mandal* v. *Asutosh Ghose* (3). It may also be noted that the petitioner is amenable to the Court in respect of the assets of his father which have come into his hands by virtue of S. 52 (2), C. P. Code. It has been attempted to be contended that because the Provincial Insolvency and the Presidency Towns Insolvency Acts differ in some respects as to the proceedings in insolvency and also in the procedure to be followed by the Courts, there is a radical difference between them in this respect, for it is admitted that under the Presidency Towns Insolvency Act a petition of this

1. (1925) I L R 49 M 217: 49 M L J 697.
2. (1918) I L R 41 M 824: 35 M L J 473.
3. (1914) I L R 42 C 225 at 232.

sort would be instantaneously dismissed. There is no ground to my mind for holding that a distinction exists between the provisions of the two Acts of a radical character of this sort and I am therefore prepared to hold that the adjudication by the learned District Judge of North Arcot was unwarranted and must be reversed. The Civil Miscellaneous Appeal must be allowed with costs.

Nagasubramania Mudali v. Krishnamachariar.

Odgers, J.

Venkatasubba Rao, J.

Venkatasubba Rao, J. :—I entirely agree. The question that has to be decided is : when a debt is due from a person in his representative character, is he liable to be adjudicated an insolvent under the Provincial Insolvency Act? An amount became due to the respondent from the appellant's father. The latter died and the respondent filed a suit against the appellant and obtained a decree against the assets of the family. It is alleged that the appellant without satisfying the decree alienated the joint family properties. On this ground the respondent sought to adjudicate the appellant an insolvent. The decree as originally passed was general in its terms, but the appellant applied for the amendment of that decree and it has now been amended. We have just held in the connected C. R. P. that it was within the power of the Court to make the amendment under S. 152, C. P. Code. There is thus no doubt that the decree as it now stands excludes altogether the personal liability of the appellant. In these circumstances, can the appellant be adjudicated an insolvent? The provision that any person who happens to be a debtor in his representative capacity is liable to be adjudicated an insolvent cannot be seriously argued, for in that case any executor or administrator may be so adjudicated by reason of his occupying that limited capacity. This, of course, would be absurd; but it is said that in the case of a coparcener of a Hindu joint family the position is different. I am not prepared to accept this contention. I regard *The Official Assignee of Madras* v. *Palaniappa Chetty* (2) as throwing very valuable light upon this point. In the case a Hindu father carried on a trade and his son took an active part in the business both while he was a minor and after he became a major. The question arose, was the son liable to be adjudicated an insolvent in respect of the debts incurred in the course of the trade while he was a minor ? Six learned Judges took part in the case at various stages, but throughout the test applied was, was the son personally liable? It was taken for granted that

2. (1918) I L R 41 M 824: 35 M L J 473.

Naga-subramania Mudali v. Krishnama-chariar.

Venkata-subba Rao, J.

if he was personally liable, he could be adjudicated an insolvent; if he was not, it was equally clear that he could not be. Three of the Judges, Bakewell, J, Phillips, J. and Sadasiva Aiyar, J., took the view that the son was personally liable for such debts and that in consequence he could be adjudicated an insolvent. The other three Judges, Sir John Wallis (Chief Justice), Abdur Rahim, J., and Spencer, J., were of the opinion that the debts were not personally enforceable against the son and therefore he could not be adjudicated an insolvent in respect of them. It will be seen that on whatever other matter there was a difference of opinion, all the Judges were agreed in this, if the debts could not be personally enforced, the debtor could not be adjudicated an insolvent.

I regard this case as correctly indicating the true rule of law and as the debt in question is not personally enforceable against the appellant, my conclusion is that he cannot be adjudicated an insolvent. It has been said for the respondent that this view of the law would create a hardship. There is no substance in this contention, for S. 50 (2) and S. 52 (2), Civil Procedure Code, provide necessary safeguards.

The respondent urges that *Muthuveerappa Chettiar* v. *Sivagurunatha Pillai* (1) supports his contention. I do not think that the learned Judges intended to lay down the general rule that a co-parcener as such is liable to be adjudicated an insolvent in respect of the debts incurred by the manager and binding on the family. The learned Judges say "Each case depends upon its own circumstances." This decision thus enunciates no principle of law. A case may be readily put of a member of a trading joint family becoming personally liable by reason of his taking an active part in the business. In such a case he can be adjudicated an insolvent and the observations in *Muthuveerappa Chettiar* v. *Sivagurunatha Pillai* (1) would be correct if applied to a case of this kind. This is exactly what was held in *The Official Assignee of Madras* v. *Palaniappa Chettiar* (2), which I have cited. I am not therefore prepared to treat *Muthuveerappa Chettiar* v. *Sivagurunatha Pillai* (1) as an authority for the general proposition which has been pressed upon us.

The respondent's learned vakil contends that under the Provincial Insolvency Act the law is different in this respect

1. (1925) I L R 49 M 217: 49 M L J 697.
2. (1918) I L R 41 M 824: 35 M L J 473.

from what obtains in England and from what is enacted in the Presidency Towns Insolvency Act. There is no substance in this contention. S. 7 of the Provincial Act corresponds word by word to S. 10 of the Presidency Act and it is impossible to suggest that such a radical change was intended in the absence of an express and clear provision to that effect.

Nagasubramania Mudali v. Kishnamachariar.

Venkatasubba Rao, J.

I agree that the appeal succeeds and should be allowed with costs.

N. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

The Madras and Southern Mahratta Railway Co., Ltd., by its agent at Madras ... *Petitioner** *(Defendant)*

v.

S. M. C. P. Nallathambi Chetti, A. Rathnavelu Chetty & Co., by its senior partner and manager A. Rathnavelu Chetty ... *Respondents (Plaintiffs).*

The M. & S. M. Railway Co., Ltd. v. Nallathambi Chetti, A. Rathnavelu Chetty & Co.

Indian Railways Act, S. 72—Risk Note—New Form B—Loss of one of several bags—Wilful neglect—Onus of proof.

The new Form B of the Risk Note of a Railway Company ran thus: "The Railway administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control and, if necessary, to give evidence thereof before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor." The consignor sued the Railway Company for the value of a bag of ground-nut which was stolen during transit in the Railway.

Held, that the meaning of the clause in the new Form B was that the Railway Company may be called upon, before the suit is filed, to disclose to the consignor how the consignment was dealt with, and that, after the case comes to Court, it shall if the Court, presumably moved thereto by the consignor, thinks it necessary, give evidence in Court as to how the consignment was dealt with, before the consignor is called upon to prove misconduct but that if the Court does not think it necessary, there is no obligation on the Railway Company to call evidence. The *onus* of proving misconduct lies still, as it always has lain under the old Risk Note Form B, on the consignor. Evidence as to how the consignment was dealt with does not mean evidence as to how the stolen goods were stolen nor does the fact of theft *ipso facto* constitute proof of misconduct.

*C. R. P. No. 113 of 1926. 28th April, 1927.

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The Central India Spinning and Weaving Co. v. *G I. P. Railway,* (1921) I L R 47 B 155 not followed.

The Bombay, Baroda and Central India Railway Co., Ltd. v. *Pratapachand Firm,* (1924) 48 M L J 400 followed.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Tiruppattur in S. C. S. No. 349 of 1925.

Vere Mockett instructed by *Messrs. King and Partridge* for petitioner.

S. Rangaswami Aiyangar for respondents.

The Court delivered the following

JUDGMENT :—This Civil Revision Petition involves a question of some importance, namely, the interpretation and effect, with reference to the onus of proof, of the wording of the new Railway form risk note B.

The facts of this case, admitted for the purpose of the argument, are that the respondent consigned 184 bags of groundnut from Jalarpet to the Salt Cottaurs Railway Station on the petitioner's Railway, that these bags were loaded and conveyed in a single waggon, that the train on reaching Arkonam was shunted into a siding where it remained for four hours, that the seals were intact when the waggon reached Arkonam, but that, when the train was about to leave Arkonam, the Station Master noticed that the one seal had been tampered with and put on his own seal, and that, on arrival at the Salt Cottaurs, it was found that one of the bags was missing. It may be inferred, and is not disputed, that the bag was stolen from the waggon while it was in the siding at Arkonam.

The respondent sued the Railway Company for the value of the bag, and the District Munsif has given him a decree He has given two reasons for that decision, (1) that it does not appear that anybody other than the employees of the Company had access to the waggon and its contents during the detention, and (2) that proviso (*a*) in the risk note, Exhibit II, renders the Company responsible. The second reason is clearly wrong. Proviso (*a*) does not lay down that the Railway Company is responsible without any proof, merely because a whole bag has been lost and the loss is not due to accident or fire. Proviso (*a*) and proviso (*b*) are both on the same footing, and subject to the procedure as to proof, which is laid down in the risk note Exhibit II. As to the first reason given by the District Munsif, there is no evidence on which the District Munsif relies for his conclusion, nor does he cite any, and it is certainly not a

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matter of legal presumption that no one but the employees of the Company could have had access to the waggon. The decision of the Lower Court is, therefore, not defensible on the grounds stated by it.

Respondent, however, seeks to support the decree by alleging that the new form of risk note has shifted the onus of proof in cases like this, that the onus no longer lies on the consignor to prove "wilful neglect" of the Railway Company, but that the onus lies on the Railway to prove absence of "misconduct" on the part of its employees. He argues that the wording of the new note implies this, but I am quite clear that this is not so. What the note says is, "The Railway Administration shall be bound to disclose to the consignor how the consignment was dealt with throughout the time it was in its possession or control, and, if necessary, to give evidence thereof, before the consignor is called upon to prove misconduct, but, if misconduct on the part of the Railway Administration or its servants cannot be fairly inferred from such evidence, the burden of proving such misconduct shall lie upon the consignor." I understand this to mean that the Railway Company may be called upon, before the suit is filed, to disclose to the consignor how the consignment was dealt with, and that, after the case comes into Court, it shall, if the Court, presumably moved thereto by the consignor, thinks it necessary, give evidence in Court as to how the consignment was dealt with, before the consignor is called upon to prove misconduct, but that if the Court does not think it necessary there is no obligation on the Railway Company to call evidence. The onus of proving misconduct lies still, as it always has lain, on the consignor. But he has now this advantage, that he can, if he wishes, have the company's servants who dealt with the consignment put into the witness-box for cross-examination, and may himself, if he can, prove his case from the examination or cross-examination of these witnesses, and the Court has then, from this evidence primarily and from any evidence called by the consignor, to examine whether misconduct can fairly be inferred or not. Obviously, evidence as to how the consignment was dealt with does not mean evidence as to how the stolen goods were stolen, nor does the fact of theft *ipso facto* constitute proof of misconduct. Such an argument, however, is the argument put forward by the respondent, who contends that the fact of theft of goods while in the custody of the Railway Company would,

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without any further evidence whatever, be conclusive proof of misconduct. Had the terms of the contract been on these lines, I am clear that the wording of the contract would have been very different.

Now, the Railway Company examined three witnesses to prove how the consignment was dealt with. Plaintiff was satisfied with that, and did not ask the Court to compel the Railway Company to disclose any further information on that point, and did not himself call any evidence. What the Court had to decide then, was, whether upon the evidence given by the Railway Company and cross-examination of these witnesses by the plaintiff, there was a fair inference that there had been any misconduct on the part of the Company. As pointed out already, there is no evidence to justify the District Munsif's conclusion that there was misconduct, nor am I pointed to any evidence in proof of such. It is argued merely that because the evidence disclosed that there was a watching staff, the Railway Company is guilty of misconduct because that staff did not prevent the theft. That is again the old argument that the fact of theft alone is sufficient proof of misconduct. Obviously, something more has to be shown, namely, that responsible care and caution was not being used by the Company or by their staff or that the staff was grossly insufficient for its purpose, so insufficient as to import negligence in the administration, or that as a matter of fact the staff was negligent, and was not doing its proper duty. The respondent further makes it a ground of complaint that the Railway Company did not examine the watching staff as to what they were doing at the time. But the remedy for that was in his own hands; he could have asked the Lower Court to compel the Company to examine the watchers; he cannnot now ask this Court to call in aid his own slackness in support of the Lower Court's decree.

According to the terms of the risk-note, he has made his contract, and has, in view of these terms, got his consignment carried at a lower rate than would otherwise be the proper one. Now that his full consignment has not been delivered, he cannot, on that fact alone, claim that he is entitled to be practically in the position of an insured consignor. The terms of his contract do not lay down that whenever his goods are stolen from the yard of the Railway Company, he is entitled to recover full value from it.

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In support of his argument respondent cites the case *Central India Spinning and Weaving Company* v. *G. I. P. Railway* (1) to prove that the onus of proof lay on the Railway Company, even under the old form of risk note. But even in that judgment, at page 167, it is clearly laid down that the onus lies on the consignor, and on the facts of that case, the learned Judges held that wilful neglect had been proved, mainly because "it is certainly conceivable that the Railway Company could have taken such care as to make it impossible for such a theft as occurred in that case to take place." But, with due respect, I think this manner of weighing the case against the defendant company went beyond the contract in the note for it calls on the company to establish that they did take such care as would render such theft *impossible*. That is throwing the onus of proof of non-liability on the defendant, instead of retaining the onus of proving liability on the plaintiff. It has been pointed out to me by Mr. Mockett for the petitioner that the case, *Smith, Ltd.* v. *G. W. Ry. Co.* (2) relied on in *Central India Spinning and Weaving Company* v. *G. I. P. Railway* (1) came up before the House of Lords, and the judgment of the House of Lords is reported in (1922) 1 A C 178. The onerous nature of the burden of proof which the consignor takes upon him on a contract of this kind is set out in emphatic terms at page 183: "For the trader to be compelled to prove that his loss was due to wilful misconduct on the part of the Railway Company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he has undertaken." And again, at page 185, it is laid down that even if the Railway Company declines to render the consignor the least assistance in the case, that will not "afford evidence which will enable the plaintiff to discharge the onus of proving what after all is a very serious fact, an act of wilful misconduct on the part of one of the Company's servants." This view has been accepted by the Calcutta High Court in a case, viz., *East Indian Railway Co.* v. *Shib Prosad Dutt Rai*(3) and the same view has been put forward by the learned Judge of this Court in *The Bombay, Baroda and Central India Railway Company, Ltd.* v. *Pratapachand Firm* (4) which, though a ruling on the old risk note, in effect, foreshadows the terms of the present risk note, and also by a Bench of the Lahore

1. (1921) I L R 47 B 155. 2. (1921) 2 K B 237.
3. (1924) 78 I C 449. 4. (1924) 48 M L J 406.

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High Court in *Gulab Rai Lahri Mal* v. *East Indian Railway Company* (5), a case in which the facts were even more strong against the Railway Company than in the present case. I am clear, therefore, that the Lower Court has gone wholly wrong in its interpretation of the contract in this case, and that its decree cannot be sustained. I, therefore, reverse the decree. and dismiss the plaintiff's suit with costs in both Courts.

N. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE CURGENVEN.

Cuddappa Ghouse Khan ... *Appellant** (*Petitioner*)

v.

Bala Subba Rowther ... *Respondent* (*Respondent*).

Cuddappa Ghouse Khan v. Bala Subba Rowther.

Provincial Insolvency Act (*V of* 1920), *Ss.* 28 (2) *and* 29—*Leave to institute suit—If a condition precedent—Leave obtained subsequent to institution of suit—Effect—Proper remedy of plaintiff in such a case.*

The leave of the Court under S. 28 (2) of the Provincial Insolvency Act is a condition precedent to the institution of the suit and must be obtained before the institution of the suit; failure to do so cannot be cured by obtaining leave subsequent to the institution of the suit.

In re Dwarkadas Tejbhandas, (1915) I L R 40 B 235 followed.

The proper remedy of a person who has instituted a suit against the insolvent without obtaining the leave of the Insolvency Court is to apply under S. 29 of the Provincial Insolvency Act to the Court in which he has instituted the suit for leave to continue the suit against the insolvent.

Appeal against the order of the District Court of Coimbatore, dated the 17th February, 1925 and made in I. A. No. 53 of 1925 in I. P. No. 150 of 1921.

K. S. Rajagopala Sastri for appellant.

S. T. Srinivasagopalachari for respondent.

The Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—This is an appeal against the order of the learned District Judge of Coimbatore dismissing the appellant's petition under S. 28 (2) of the Provincial Insolvency Act wherein the appellant asked for leave to prosecute his suit—O. S. No. 43 of 1924—on the file of the Sub-Court, Bellary. It appears that on the 30th July, 1921 one Bala Subba Rowther, the respondent in the petition to the District Judge of Coimba-

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*A A O No. 133 of 1925. 12th April, 1927.

5. (1925) I L R 6 Lah. 305.

tore, was adjudicated insolvent. On the 9th June, 1924 a suit was instituted in the Bellary Sub-Court on a promissory note which had been executed on 14th May 1921 by the insolvent to a third party and which in March, 1924 was transferred to the appellant here. The plaintiffs in the suit are said to have only become aware of the insolvency of Bala Subba Rowther when the latter filed his written statement. They have therefore applied to the Coimbatore Court which is the Insolvency Court for leave to prosecute the suit which, as stated, was refused on the ground that leave is a condition precedent to the institution of proceedings. The relevant provisions of the Provincial Insolvency Act are Ss. 28 (2) and the words

"No creditor . . . shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose."

"The Court" in this sub-section is clearly the Court in which the insolvency proceedings take place. S. 29 enacts that any Court in which a suit or other proceeding is pending against a debtor shall, on proof that an order of adjudication has been made under this Act, either stay the proceeding or allow it to continue on such terms as the Court may impose. It would therefore seem that the proper remedy of the appellant here would have been to apply to the Bellary Court for leave to continue his suit against the insolvent, whereas he applied to the Insolvency Court in Coimbatore for leave to prosecute the suit. The corresponding provisions in the English Act are Ss. 7 and 9 which contain practically the same provisions. So the short question is whether the learned District Judge was right in holding that the words in S. 28 (2)

"or commence any suit or other legal proceeding except with the leave of the Court"

are to be construed as constituting a condition precedent.

We have been referred to two English cases which were urged on Davar, J., of the Bombay High Court in *In re Dwarkadas Tejbhandas* (1), where the learned Judge sitting alone decided under S. 17 of the Presidency Towns Insolvency Act, where the words are identical, that leave is a condition precedent and cannot be granted after the suit is filed. The learned Judge went into the question at some length and held

1. (1921) I L R 40 B 235.

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that the words of the section are clear and explicit and leave no room for any other construction. The first of these English cases is *In re Wanser, Limited* (2). There the company had taken premises in Glasgow and the landlord had proceeded by the Scotch method of sequestration for the purpose of realizing his rent. The landlord's hypotheca was in Scotch Law held to afford a security to him on the goods on the premises, and in spite of the order for winding up that was made, leave was given to proceed with the sequestration unless sufficient security was given by the tenant for the rent. This is a proceeding under the Companies Act, and it appears to establish that the proceeding at Scotch Law is such that the landlord is in the nature of a secured creditor. According to North, J., he is in a position analogous to that of a debenture holder. If that is so, he is no doubt at least partially outside the provisions of the law relating to companies' winding-up. I do not think it can, as Davar, J., held, be in any way taken as a precedent in the present case.

The other English case is *Rendall* v. *Blair* (3), a case under the Charitable Trusts Act, 1853. The managers of a charity school purported to dismiss the plaintiff who was the master of the school. The question raised by the action was whether the managers had been properly appointed. The words of the section which was considered by the Court of Appeals, S. 17 of 16 and 17 Vic. c. 137 ran:

"Before any suit, petition or other proceeding . . . for obtaining any relief, order or direction concerning or relating to any charity or the estate funds, property or income thereof, shall be commenced, presented or taken, by any person whomsoever, there shall be transmitted by such person to the said Board, notice in writing of such proposed suit, petition or proceeding, ... : . and the said Board . . . may, by an order or certificate . . . . authorise or direct any suit, petition or other proceeding to be commenced, presented or taken with respect to such charity."

Kay, J., thought the suit ought not to have been begun without the leave of the Charity Commissioners. The Court of Appeal by a majority held that the action was not such as required the consent of the Charity Commissioners, but the whole Court held that even if the consent of the Charity Commissioners were necessary it was not necessary to obtain it before the commencement of the action. Cotton, L. J., admits in his judgment that consent ought to have been applied

2. (1891) 1 Ch. 305. 3. (1890) 45 Ch. D. 139.

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for before the action is begun but observes that the statute does not say that, if the consent is not obtained the action must be dismissed and cannot be proceeded with till that consent is obtained. In the course of the decision the learned Lord Justice held that consent may be obtained after the petition or after the action has been commenced. The learned Lord Justice thought that the sanction of the Charity Commissioners was necessary. Bowen, L. J., thought it was not. As it was, the present action was one solely to enforce a common law right and the consent of the Commissioners was only to be obtained where the administration of the trust was sought. The learned Judge agreed that, though it was not necessary to decide it, the proper course would not be to dismiss the action altogether but to allow it to stand over to see if the consent of the Commissioners could be obtained. He thought the language is not such as would be used if it were intended that some preliminary step should be taken before the action is maintainable at all and that the absence of the consent of the Commissioners is only a bar to the Courts dealing with the action, not a bar to the original institution of the suit. This is where I venture to think the difference in language emerges, and the language of S. 28 (2) of the Provincial Insolvency Act is intended to be a bar to the original institution of the suit. In my opinion therefore neither of the two English cases which are on different statutes from the one we have to consider really touch the point. Beyond the decision in *In re Dwarkadas Tejbhandas* (1) there is the observation of Sadasiva Aiyar, J., in *Ammukutty* v. *Manavikraman* (4). The question before the learned Judge was whether a suit instituted against the Receiver appointed by a Court without obtaining the previous sanction of the latter affected the jurisdiction of the Court. It was held that the condition did not affect the jurisdiction but was one imposed to enforce due respect towards Courts of Justice and could be effectively cured by obtaining sanction during the course of litigation. The learned Judge in the course of his judgment said:

> "This sanction is not a condition imposed by statutory law like the sanction mentioned in S. 92, Civil Procedure Code or S. 17 of the Presidency Towns Insolvency Act."

That of course is only a passing opinion, but in the absence of much clearer authority it is an opinion to be taken into consideration. The curious part about this case is that on the

1. (1921) I L R 40 B 235. 4. (1920) I L R 43 M 793.

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18th August, 1925 the adjudication in insolvency was annulled and the annulment was confirmed by the High Court in May, 1926 and in April, 1925 the suit in the Bellary Court was dismissed on the ground that it was not maintainable under S. 28 (2) although the learned Judge allowed the plaintiff liberty to apply for restoration under S. 151, Civil Procedure Code, as soon as sanction was granted either by the High Court on appeal or by the District Judge of Coimbatore on a remand of the matter to him. It is now of course too late for the appellant to begin a new suit on the promissory note and he is, therefore, forced to come to us to say that leave ought to have been given to him to prosecute his suit of 1924. For the reasons stated I think that the words in S. 28 (2) of the Provincial Insolvency Act constitute a condition precedent and that leave must be obtained before the institution of the suit. I would, therefore, follow the ruling in *In re Dwarkadas Tejbhandas* (1) and dismiss the C. M. A. with costs.

Curgenven, J.

Curgenven, J. :—I agree that under S. 28 (2) of the Provincial Insolvency Act prior leave must be obtained to institute a suit during the pendency of the insolvency proceedings, and that failure to do so cannot afterwards be cured; and accordingly that this C. M. A. should be dismissed with costs

N. S. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice*, MR. JUSTICE BEASLEY AND MR. JUSTICE SRINIVASA AIYANGAR.

The Commissioner of Income-tax, Madras ... *Referring Officer**

v.

S. K. R. S. L. Firm, Sivaganga Circle, Okkur ... *Assessee.*

F. B.

Commissioner of Income-tax v. S.K.R.S.L. Firm.

Indian Income-tax Act (XI of 1922), S. 4 (2)—Business outside British India—Profits earned more than three years before the year of assessment and profits earned within that period—Remittance of amount to British India—Presumption whether remittance made from earlier profits.

When a man has profits earned more than three years before the year of assessment and also profits earned within that period to his credit in a trade carried on by him outside British India, there is no presumption that a remittance made to him in British India of a sum which might fall in

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*Referred Case No. 10 of 1926. 23rd March, 1927.

1. (1921) I L R 40 B 235.

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Commissioner of Income-tax v. S.K.R.S.L. Firm.

ther there were any profits available at Colombo for remittance to India. Now at Colombo there were three accounts running which have to be considered. The first began in February 1917, and was closed in October, 1921. The second began in January 1920 and has not yet been closed. The third new account began in January, 1923, and is, of course, still running. The first account had yielded a profit of about Rs. 11,000. It is contended that the bulk of this profit had been made prior to April 1918 and that since April 1918 there had been a loss of Rs. 28,766.The second account, up till March, 1924, had resulted in a profit of Rs. 88,700. The third account, up till the end of the year under consideration, had made a small profit of Rs. 852. The Income-tax Officer therefore held that the profit available for remittance was Rs. 89,552, *i. e.*, the profits of the second and third agencies. During the course of the appeal proceedings it was admitted by the department that the loss made in the first account after April, 1918 should be deducted before arriving at the profits available for remittance. I do not consider that this concession was necessary. The loss in that period may well have been adjusted against earlier profits. The matter is, however, of no great importance for even allowing the deduction of Rs. 28,766, there is a profit of Rs. 51,786 available for remittance and that profit is greater than actual sum which is proposed to tax. The vakil for assessees, while admitting the general legal presumption that, if profits are available, a remittance must be held to include profits until the contrary is proved, claims that in this case he has rebutted that presumption. At Colombo a current account is kept of the transactions between the headquarters of the firm and the Colombo branch. At the beginning of 1918-19 there was a balance in favour of headquarters of Rs. 44,748 consisting of old profits. During the continuance of the first agency money was going backwards and forwards between headquarters, Rangoon and Colombo and at the end of the agency the balance in favour of headquarters stood at Rs.1,48,475 including an entry of Rs. 66,244 being the profits of a still earlier agency. The second agency therefore opened with a balance of Rs. 1,48,475 in favour of headquarters. It has not yet been definitely closed but the balance of Rs. 1,30,987 has been carried forward to the new account on 31st March, 1923. This balance includes the profits of the first agency Rs. 11,280, which was adjusted on 3rd February, 1923. The third agency account opens on 1st April, 1923 with a credit balance of Rs. 1,30,987 in favour of headquarters and closes on 31st December with a balance in favour of headquarters of Rs. 88,709 which was then transferred to the accounts of the three individual partners because a partition was being effected. It has been asserted that there is no credit in the last agency account for the profits of the second agency and that the Rs. 55,000 which was transferred to Rangoon on 31st August, 1923 is debited in this latest agency account. It is argued therefore that as the profits of Rs. 51,786 or Rs. 89,552 have not yet been credited in the third agency account while the profits of the earlier agencies have been so credited it must be taken that the

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remittance of Rs. 50,000 came out of the profits of the older agencies which have now become capital through the efflux of time and that therefore the ordinary presumption is rebutted. I cannot accept this view. In the first place, the interest on partner's capital which makes up part of the profits of the second agency *has* been adjusted in the current account in the third agency, so that in any event that portion of the profits, viz., Rs. 36,800 is obviously taxable. But I am not prepared to admit that the balance of Rs. 13,200 is not taxable. The position is simply that of a man who is running one single account between his foreign branch and his branch in India. That account includes both capital and income. He has come at his disposal in the foreign branch but refrains from entering the whole of it in that current account. I cannot concede that the omission to make the entry has any bearing whatever on the question whether a remittance did or did not come from profits. If the assessees' present contention were admitted it would be easy for every Nattukottai Chetty trading abroad to escape assessment by the simple device of keeping his profits out of the accounts which he produces before the Income-tax Department until they are more than four years old.

3. Another argument for holding that the adjustment of Rs. 50,000 on 31st August, 1923, is good proof that remittances to that extent were from profits is supplied by the ledger showing the transactions between headquarters at Okkur and Rangoon in 1923-24. Immediately after the Rs. 50,000 had been entered as transferred from Colombo a sum of Rs. 29,059 was spent by the partners on private charities while a sum of Rs. 32,948 was used to clear off the overdrawals made by them in their Mannargudi branch.

4. It has further been argued before me that the presumption that the second agency profits of Rs. 88,700 were included in the remittance of Rs. 50,000 is also rebutted by the fact that there were doubtful debts outstanding to the extent of Rs. 52,264. The plea is that if a man has some old profits on which he may draw with safety he will not draw upon recent profits of a doubtful nature. I do not think there is anything in this argument. There certainly appear to be debts to the value of Rs. 52,264 outstanding but it has not been proved that they are irrecoverable or even of doubtful value. The debts may have been left uncollected because the security was good. These debts have not been written off even on 31st March, 1925. On 31st August, 1923 therefore they remain on the books as a sound credit upon which the partners could draw.

5. The petitioners' vakil asked me, if I did not accept his contention, to state a case to the High Court. I am not prepared to do so as I do not see that any point of law is involved. The only legal proposition on which I am relying is that there is a presumption that a remittance is from income until the assessee proves the contrary. That proposition is supported by the case of *The*

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Scottish Provident Institution v. *Allen* (1). The question now at issue is whether the assessee has rebutted the presumption. That is a question of fact and I find from a study of the accounts that there is nothing in them to show that the remittance must have been made from capital or old profits not liable to taxation and that on the contrary the accounts indicate that the remittances were from recently acquired profits. The assessment will accordingly be enhanced by the inclusion of Rs. 50,000 under the head "Remittances".

M. Patanjali Sastri, Special Counsel, for Referring Officer.

K. S. Krishnaswami Aiyangar instructed by *K. S. Rajagopalachari* for assessee.

The Court delivered the following

JUDGMENT :—The question referred to us is in the following terms:—

"When a man has profits earned more than three years before the year of assessment and also profits earned within that period to his credit in a trade carried on by him outside British India, is there any presumption that a remittance made to him in British India for a sum which might fall in either set of profits is made from the earlier profits and not from the later."

Under S. 4 (2) of the Act profits and gains of a business accruing or arising without British India to a person resident in British India shall, if they are received in or brought into British India, be deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought, notwithstanding the fact that they did not so accrue or arise in that year, provided that they are so received or brought in within three years of the end of the year in which they accrued or arose. That appears to us to be a clear intimation that sums remitted to British India are to be deemed to have accrued or arisen in the year of remission unless they accrued or arose more than three years before. We entertain no doubt that the effect of that must be to cast upon the assessee the burden of proving that the profits accrued or arose more than three years back, a matter after all peculiarly within his knowledge and not within the knowledge of the Income-tax authorities. That is our answer to the reference and it is clear that the Commissioner acted on that principle; and whether he came to a right conclusion of fact in the light of it or not, is not for us. It is no doubt true that, in appending reasons for his own opinion on the point he was referring as he is directed under the Act to do, he enounced some very dubious propositions of law.

1. (1903) A C 129.

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That does not alter the position that in paragraph 5 of his review order he dealt with the question of fact unvitiated by any such misdirection of himself and dealt with it adversely to the assessee. The answer to the reference is in the negative.

The assessee must pay Rs. 250 for the costs of the Commissioner.

N. S. *Reference answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Alamelu Ammal ... *Petitioner* (Plaintiff)*

v.

T. S. Venkatarama Aiyar ... *Respondent (Defendant).*

Alamelu Ammal
v.
Venkatarama Aiyar.

Provincial Insolvency Act (V of 1920), S. 42—Refusal of final discharge—If ipso facto *determines the insolvency proceedings—Necessity of order of annulment.*

The refusal, under S. 42 of the Provincial Insolvency Act, of a final discharge does not *ipso facto* determine the insolvency proceedings. In every case where such an order has been passed the Court might *suo motu* or on the motion of a creditor annul the adjudication but, until it is annulled, the insolvency proceedings are still pending.

Rowe & Co. v. *Tan Thean Taik,* (1924) I L R 2 Rang. 643 followed.

Maung Po Toke v. *Maung Po Gyi,* (1925) I L R 3 Rang. 492 not followed.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order dated 7th August, 1925 of the Court of Small Causes at Kumbakonam in E. P. No. 2145 of 1925 in S. C. S. No. 1947 of 1920 on the file of that Court.

S. Subramania Aiyar for petitioner.

K. S. Desikan for respondent.

The Court delivered the following

JUDGMENT :—This Civil Revision Petition is against the order of the Lower Court in a matter of execution. The petitioner put in an execution petition praying for the arrest of his judgment-debtor (respondent). The respondent urged that he is still an insolvent and that the proceedings in insolvency are still pending, that the petitioner has not got permission of the Insolvency Court to open execution proceedings against him and that therefore the petition is not maintainable. The respondent was adjudicated insolvent on 6th January, 1921. The petitioner, however, claims that the insolvency

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*C R P No. 1283 of 1925, 18th April, 1927,

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proceedings have come to an end since the respondent applied for and was refused a final discharge on 30th October, 1923. The petitioner put in a petition for review of that order which was dismissed on 15th March, 1924. The present execution petition was put in on 30th April, 1925. It is admitted that the respondent's adjudication has not been annulled.

The question for decision is, does the refusal, under S. 42 of the Provincial Insolvency Act, of a final discharge *ipso facto* determine the insolvency proceedings? The Lower Court has held that it does not, and I agree. It is the order of adjudication which vests the property of the insolvent in the Court or in the Official Receiver (*see* S. 28). It would follow that until and unless that order is annulled the property continues to vest in Court, and so long as that vesting remains, the insolvency proceedings cannot have come to an end. It would be absurd to hold that it was open to an execution-creditor without the permission of the Insolvency Court to arrest his judgment-debtor for not satisfying his decree-debt, when the assets of the judgment-debtor are not vested in him or under his control, and when the Official Receiver is still holding them for the benefit of the judgment-debtor's general body of creditors. Further, an order of refusal of a final discharge is not in itself necessarily final. There are cases in which it may not be final. For example, the final order of discharge may be refused because the insolvent's assets are less than eight annas in the rupee but the insolvent may subsequently come into property which would enable a dividend of more than eight annas to be paid and the Court might on that finally grant him an absolute order of discharge. Obviously, the insolvency proceedings must in such a case be pending after the first refusal to grant an absolute order of discharge. It is true that Act V of 1920 does not provide that the pendency of an insolvency proceeding shall be terminated in every case by annulment of adjudication. Such annulment is provided for by Ss. 35, 36, 39 and 43. But these sections do not cover every possible case. It is clear from the scope of the Act that if a Court intends to bring the insolvency proceedings to an end and restore the *status quo ante* it must annul the adjudication. In every case where an order under S. 42 has been passed the Court might *suo motu* or on the motion of a creditor annul the adjudication, but until it is annulled the insolvency proceedings are still pending.

Another indication that this is the correct view is, that while under S. 37 the order annulling an adjudication must be pub-

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lished, there is no section which says that the order of refusal to discharge must be published The purpose of publication is obviously to notify to the public that the insolvency has come to an end. If it came to an end by an order of refusal to discharge then it would be equally necessary to direct the publication of that order. That the Insolvency Court in the present case did not close the proceedings is clear from the fact that the petitioner himself received a dividend from the Official Receiver on 26th November, 1924, five months before his execution petition and 11 months after the order refusing absolute discharge. It is now suggested that the payment might have been sanctioned long before the order of refusal, but there is nothing on the record to warrant that suggestion.

There is a surprising lack of authorised reported rulings on this point of law. A case in Rangoon has been cited to the contrary. The ruling is by a single Judge reported in *Maung Po Toke* v. *Maung Po Gyi* (1). Another learned Judge of the same Court has ruled to the contrary effect in *Rowe & Co.* v. *Tan Thean Taik* (2), and I find myself in agreement with the latter's view.

It is not necessary to go into the further question as to whether the execution petition is barred by limitation. The Lower Court has made no error of law in holding that the insolvency proceedings were pending at the time of the execution petition and that S. 28 barred the application as no permission of the Insolvency Court was obtained. I therefore refuse to interfere and I dismiss the C. R. P. with costs.

N. S. *Petition dismissed.*

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1. (1925) I L R 3 Rang. 492. 2. (1924) I L R 2 Rang. 643.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT :—LORD SINHA, LORD BLANESBURGH, LORD SALVESEN, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Maung Po Nyun ... *Appellant** (*Defendant*)

v.

Ma Saw Tin ... *Respondent* (*Plaintiff*).

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Burmese Buddhist Law—Husband and wife—Divorce on ground of desertion—Forfeiture of property—"Virgin couple".

Under the Burmese Buddhist Law, desertion by the husband for three years, with failure to provide maintenance, undoubtedly entitles the wife to a divorce, but not necessarily to a divorce with possession (*i. e.*, forfeiture) of all the husband's interest in the property. In other words, the husband does not, by reason of his desertion of his wife, forfeit to her the whole of his interest in the property, joint or separate.

The proposition enunciated by the Courts in Burma that "where a divorce is adjudged through the fault of one party, the innocent party obtains all the property, including the joint property as well as the separate property of the guilty spouse", is too widely stated and is not supported by any text in the Dhammathats or in the Burmese Buddhist law books.

The question when the parties may be considered as "virgin couple", left open.

Appeal (No. 62 of 1926) from a judgment and decree of the High Court, Rangoon (Heald and Chari, JJ.), dated the 27th February, 1925, affirming a decree of the District Judge of Myaungmya, dated the 13th December, 1923.

The facts are set out in the judgment of the Judicial Committee. The case in the Court below is reported in I. L. R. 3 Rang. 160.

Dunne, K. C. and *Raikes* for appellant.

Pennell for respondent.

26th July, 1927. The Judgment of their Lordships was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal by Maung Po Nyun, who was the defendant in the suit, against a decree of the High Court of Judicature at Rangoon, dated the 27th February, 1925, affirming a decree of the District Judge of Myaungmya, dated the 13th December, 1923.

The plaintiff, who is the respondent in this appeal, brought the suit against her husband, claiming a divorce on account of his desertion and a partition of the properties specified in the

*P C Appeal No. 62 of 1926. • 26th July, 1927.

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Schedules A and B of the plaint. She alleged that she was entitled to one-third of the properties in Schedule A and to one-sixth of the profits in Schedule B.

The learned District Judge made a decree granting the plaintiff a divorce and the shares in the above-mentioned properties which she claimed. The defendant appealed to the High Court, which dismissed his appeal with costs.

At the hearing of the appeal before their Lordships, the learned counsel, who appeared for the appellant-defendant, did not contest the plaintiff's right to a decree for divorce, and the arguments on both sides were confined to that part of the decree which awarded to the plaintiff one-third of the properties mentioned in Schedule A and one-sixth of the profits specified in Schedule B.

The learned counsel for the appellant-defendant did not contest the plaintiff's right to the one-sixth of the profits in Schedule B, but he argued that the plaintiff was entitled merely to one-sixth of the property comprised in Schedule A and not to one-third thereof, as decreed by the Courts in Burma.

The appeal, however, involves much more than the point which has been stated above, and that is by reason of a principle which was adopted by the Courts in Burma and upon which they based their judgments.

For the moment it may briefly be referred to in the words of the learned District Judge as follows:—"Where a divorce is adjudged through the fault of one party, the innocent party obtains all the property, including the joint property as well as the separate property of the guilty spouse."

It is clear, therefore, from the above-mentioned statement, that this appeal involves a question of great importance, and it is necessary for their Lordships to decide whether this statement of the law, which must obviously have far-reaching effects, can be supported.

The facts of the case may be shortly stated as follows:—

The defendant had married another wife before he married the plaintiff. The first wife lived with the defendant and his adoptive mother for some time, and then, in consequence of quarrels, the first wife left the defendant and went to live with her parents.

A few months later the defendant expressed a desire to marry the plaintiff, and his mother accordingly approached the plaintiff's parents with a view to their daughter's marriage.

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The defendant had told his mother that he had severed his connection with his first wife, and accordingly the defendant's mother, when asked by the plaintiff's parents as to the first marriage, assured them that the defendant had divorced his first wife.

The plaintiff's parents, having received this assurance, consented to their daughter's marriage. She was married the same day and she went to live with the defendant and his mother.

A few months later the defendant's mother died.

The defendant continued to live with the plaintiff for about two months longer, and then, in or about April, 1920, he left her and went to live with his first wife, whom, in fact, he had not divorced. The suit was filed in September, 1923, more than three years after the plaintiff was deserted by the defendant, and it was found by the learned District Judge, and his finding has not been disputed, that during the period from April, 1920, up to September, 1923, the defendant did not resume conjugal relations with the plaintiff, and did not give her any maintenance.

The learned Judge found that the defendant deserted the plaintiff and that the marriage was brought about by the above-mentioned misrepresentation that his connection with his first wife had been severed, and he held that the plaintiff was entitled to a decree for divorce. The High Court agreed that the plaintiff was entitled to a decree for divorce, and that part of the decree, as already stated, has not been contested before their Lordships.

It appears that the defendant's mother died in January, 1920, and that about four months before she died she had given to the defendant by deed about 185 acres, which were part of the 233.38 acres mentioned in Schedule A.

After her death her inheritance was divided, the defendant getting the house and the remainder of the property mentioned in Schedule A, which included 29 acres which had been given shortly after the defendant's marriage with the plaintiff.

On the question of partition, both the Courts in Burma held that, inasmuch as the plaintiff was entitled to a divorce on the ground of the defendant's desertion, she was, strictly speaking, entitled to all the husband's property, except the first wife's interest therein; or, stating the same proposition in another way, that the plaintiff was entitled to all the husband's interest in the property, which would be considerably more than the shares which the plaintiff had claimed in her plaint. The learned Judges of the

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High Court expressed the opinion that it was difficult to understand on what principle the plaintiff's claim was based; but they came to the conclusion that as she had confined her claim to the shares mentioned in the plaint and had obtained a decree in respect thereof, they saw no reason for saying that the decree was wrong or that the defendant had been prejudiced by it.

The question whether the plaintiff was entitled to all the husband's interest in the property was argued at great length, and the attention of their Lordships was drawn to the translations of many of the Dhammathats and to many reported decisions.

Their Lordships do not think it necessary to refer to them in detail, because it is clear, as was admitted by the learned counsel who appeared for the plaintiff, that there is no text which imposes forfeiture of property upon a husband who deserts his wife, and that there is no reported case in which a decree for forfeiture of his property has been made against a husband by reason of his desertion of his wife or one of his wives.

Further, the learned Judges of the High Court stated that

"it is admitted that the Burmese law books do not lay down any rule of partition on the divorce of the husband by one of two or more wives of equal status, and that there is no case-law on the subject. It is, therefore, necessary to decide the matter in accordance with the principle of justice, equity and good conscience, having regard to the general rules of Burmese Buddhist law so far as these rules can be applied."

Their Lordships desire to make it clear that the opinion expressed by them is confined to the particular facts of this case and the question arising in respect thereof, viz.: assuming that the defendant deserted the plaintiff, his second wife, in April, 1920, and that for more than three years he did not resume conjugal relations and gave her no maintenance, and that consequently the plaintiff was entitled to a decree for a divorce, was she entitled to the whole of the husband's interest in the property, which was the subject-matter in the suit?

The learned counsel for the appellant argued strenuously that on the true construction of the plaint, the suit was really based on an allegation of divorce by mutual consent.

Their Lordships are not able to accept that argument, and the case must be considered upon the basis of the findings of fact of the Courts in India.

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The learned District Judge began his judgment on this part of the case by saying, "The parties will have to be considered as virgin couple."

Before his marriage with the plaintiff, the defendant had been married to another woman, who was alive at the time of the marriage with the plaintiff, and from whom he had not been divorced.

The plaintiff, of course, had not been married before, and, while some indications are to be found in the texts to the effect that where the spouse in that position is the aggrieved party, the union may be so described in proceedings for divorce, in their Lordships' opinion, it is not necessary in this case to decide the point and they must not be taken as affirming the abovementioned proposition.

The learned District Judge then proceeded to the statement which has already been quoted, and which for convenience may be restated, as follows:—

"Where a divorce is adjudged through the fault of one party, the innocent party obtains all the property, including the joint property as well as the separate property of the guilty spouse; but, of course, the share of the head wife must be excluded."

In their Lordships' opinion, this statement is made in too wide and too general terms.

In the first place, it takes no account of the difference between the position, rights and duties of the husband and those of the wife in Burmese law.

It is clear that the Dhammathats recognised the difference in many respects, which it is not necessary to mention in detail.

In the second place, as has already been stated, there is no case in which a wife has obtained a decree of forfeiture of all her husband's interest in the property on the ground of his desertion.

It is also the fact that there is no case in which a wife has claimed such a forfeiture, and even in the case before their Lordships the plaintiff has not made such a claim.

As already mentioned, the Dhammathats do not contain any text which provides that if the husband deserts his wife, or one of his wives, she is entitled to the whole of her husband's interest in the property.

In the digest of Burmese Buddhist law arranged by U Gaung, Vol. II, dealing with marriage, section 312 (Manugye), desertion is dealt with, and some of the rights of the parties

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ensuing upon desertion, such as the right to marry again, are described.

If it had been the law that the husband would forfeit all his interest in the property, joint or separate, if he deserted his wife, or one of his wives, for three years and left her without maintenance, it is almost inconceivable that there would not have been found in the Dhammathats a statement of the law to that effect.

The proposition which the Courts in Burma adopted as the basis of their judgment, viz., that because the defendant deserted the plaintiff she was entitled to divorce with possession of all the husband's interest in the property, the subject-matter of the suit, is in itself a startling proposition, and if adopted would have very far-reaching effects.

There is no text in the Dhammathats or in the Burmese Buddhist law books to support it, there is no case-law on the subject, and the respondent's learned counsel was not able to draw their Lordships' attention to any case in which even a claim based on such a proposition had been made.

In these circumstances, their Lordships are not prepared to accept and endorse the above-mentioned proposition.

This, however, does not dispose of the appeal, because it still remains to be considered whether the appellant-defendant has succeeded in showing sufficient reason to justify their Lordships in interfering with the decree which the plaintiff in fact obtained as to her shares in the property and the profits thereof.

In deciding this question, their Lordships think it is material to take into consideration the general rules of the Burmese Buddhist law as regards the interest which the wife obtains in the husband's property at the time of the marriage, and in the property acquired by him after the marriage, and the fact that the Dhammathats treat the division of property as part of the law of divorce, as to which there does not seem to be any serious dispute.

In their opinion, it is also material and important to consider the facts of this case; as, for instance, that the marriage with the plaintiff was brought about by misrepresentation, that the plaintiff was an entirely innocent party, that, shortly stated, the facts relating to the desertion were of an aggravated nature and quite unjustifiable, and that desertion, where there is a duty to comfort and support, is regarded by the Burmese as a serious offence.

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Taking these matters into consideration and the above-mentioned rules of the Burmese law as to the wife's interest in her husband's property, their Lordships are not prepared to say that the decree appealed from, which awarded to the plaintiff the shares in the properties in suit specified therein, was unreasonable or contrary to justice, equity and good conscience.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant : *Douglas, Grant & Dold.*

Solicitor for respondent : *J. E. Lambert.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—VISCOUNT SUMNER, LORD SINHA, LORD BLANESBURGH, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

The Secretary of State for India in Council ... *Appellant** (*Deft.*)

v.

Girjabai ... *Respondent* (*Plff.*).

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Saranjam—Grant of revenue only—Grantee not competent to create occupancy rights—Effect of resumption of grant.

The incidents of a Saranjam grant considered.

Decisions with regard to *Inams* are not necessarily applicable in considering the incidents of a peculiar grant like the Mahratta saranjam.

The mere fact that the Saranjamdar is in a sense a life-tenant does not alter the ordinary incidents of a grant by way of saranjam. In the absence of a deed of grant, those incidents must be ascertained from (*a*) the evidence, if any, in the case; (*b*) from legislative enactments; and (*c*) from judicial decisions.

In the case of a saranjam grant of the royal share of the revenue, it is not competent for the Saranjamdar (*i e.*, the grantee) to acquire or create *in his own favour* occupancy rights which may remain unaffected by the subsequent resumption of the saranjam. In other words, when a saranjam of this nature is resumed, the Government becomes entitled to resume not only the land revenue, but also all the rights and benefits that the grantee had acquired or secured by virtue of his grant and *qua* Saranjamdar.

The principle of the decision in *Secretary of State for India in Council* v. *Laxmibai,* (1922) I L R 47 Bom. 327: L R 50 I A 49: 44 M L J 471 (P C) (a case relating to a grant of the soil itself) applied.

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*P C Appeal No. 116 of 1925. 26th July, 1927.

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The Judicial Committee left open the question whether, in the case of saranjam grants of the revenue only, the grantee could validly create occupancy rights *in favour of third parties* which could survive the resumption of the saranjam.

Judgment of the High Court reversed.

Appeal (No. 116 of 1925) from a judgment and decree of the High Court, Bombay (Sir Lallubhai Shah, Acting Chief Justice and Mr. Justice Fawcett), dated the 15th August, 1924, varying a decree of the District Judge of Nasik, dated the 28th February, 1920.

The material facts are set out in the judgment of the Judicial Committee, and also in the report of the case in the Court below (*see* 26 Bom. L. R. 1173).

Lowndes, K. C. and *Kenworthy Brown* for appellant.

De Gruyther, K. C. and *E. B. Raikes* for respondent.

26th July, 1927. The Judgment of their Lordships was delivered by

Lord Sinha.

LORD SINHA :—This is an appeal against a decree of the High Court of Bombay, dated 15th August, 1924, which varied the decree of the District Court of Nasik, dated 28th February, 1920, and made in C. S. No. 5 of 1914.

The suit arose under the following circumstances:—

Manmad village, now grown to an important railway junction, was held by the Vinchurkar—one of the lesser Mahratta chiefs—together with many other villages in "Saranjam" grant from the Peishwa, the then ruler of the country. The last holder of the entire saranjam was the late Sardar Raghunathrao Vinchurkar, commonly known as Annasaheb, who held it from 1836 till 1889, when he died. On his death-bed he adopted as a son the plaintiff Shivdevrao, but the Government refused to recognise the adoption, and in 1892 re-granted half of the saranjam to the late Sardar's brothers and their sons and resumed the other half, which included Manmad village. The adopted son, though thus excluded from any share in the saranjam, would still be entitled to the *private* as opposed to the *saranjam* property of his adoptive father. Between 1892 and 1913 there were disputes between Government and Shivdevrao Vinchurkar as to certain lands in Manmad (the subject-matter of the present suit) which he claimed as his adoptive father's *mirasi* or private property by virtue of a sale deed of 1755. These are five plots in the village site (described as A to E in the plaint) and six plots of agricultural lands within the

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village limits but not forming part of the village site, and described as Plots F to K in the plaint.

These disputes led to an order by the Commissioner of Revenue C. D. on the 9th April, 1913, whereby it was held that the lands in dispute were not covered by the sale deed relied upon but "must have passed into the possession of the Vinchurkars by forfeiture of lands through the Khatedar's (*i.e.*, modern occupancy tenant) family being extinct or through default in the payment of land revenue." The Commissioner held that on the lapse of the saranjam to Government these lands also became the property of Government, who thereupon became entitled to levy not merely the Government revenue assessed thereupon, but the actual ground rent in respect of the plots included in the village sites, the tenants being liable to pay these rents to Government and not to the Vinchurkars; and, further, that in respect of the other plots, *i.e.*, the agricultural lands, Government as owner was entitled to recover from the Vinchurkars not the assessed Government revenue, but the *market* rent, which was considerably larger, and in default of payment the Vinchurkars were ordered to be evicted.

This order of the Commissioner was in due course given effect to, and Shivdevrao Vinchurkar instituted the present suit for declaring the Commissioner's order illegal and for recovery of possession of the first five plots and an injunction against the threatened eviction in respect of the other six plots, and for mesne profits in respect of both.

In his plaint he based his title *primarily* on the sale deed of 1755 above mentioned, by which the then Patils of the village conveyed half of their rights to the ancestor of the Vinchurkar. He also relied on adverse possession "*for over* 150 *years*," and claimed that by virtue of certain admissions at different times on the part of various Government officials, Government was estopped from disputing the *mirasi* or private rights of the Vinchurkar family. But he alleged as an alternative basis of his title, and apparently in view of the Commissioner's finding. that "even if perchance the Court comes to the conclusion that the right of *mirasi* ownership . . . did not pass to the plaintiff's ancestors under the sale-deed of 1755 A. D., but that the property in suit *must* have gone into the possession of the plaintiff's ancestors by reason of the extinction of the Khatedar's family or by reason of its resumption for arrears of assessment, still no manner of right whatever has accrued or accrues to the

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defendant in law over the said property. The said property is in law of the absolute personal and *mirasi* ownership and *vahiwat* of the plaintiff and his ancestors." (Para. 3 of plaint).

By his written statement the defendant denied all these allegations of fact and submissions of law by the plaintiff, and contended that the lands in suit were held by the plaintiff's ancestors as Saranjamdars and all saranjam rights, including the right to hold lands that had passed into his possession and enjoyment by the death of the Khatedars without heirs or by forfeiture, had lapsed on the death of Annasaheb and had been resumed by Government (except as to one-half not now in question).

On the question of title by adverse possession and by estoppel, both the District Judge and the High Court held against the plaintiff, and their Lordships see no reason to differ from them.

Of the remaining issues the first was as follows:—Does the plaintiff prove that he (*i. e.*, his ancestors) purchased the suit land by a sale-deed of 1755 A. D.?

The District Judge held that the construction of the deed in question presented some difficulty, for "it is in archaic language, and deals with a state of affairs to which no one now has the key," but on a review of the whole evidence, including village papers and accounts, he came to the conclusion that the lands sold by that deed did not include the lands in suit, and he found the first issue in the negative.

The High Court accepted this.

Notwithstanding this concurrent finding, some argument was addressed to their Lordships to prove that some, though not all, of the lands in suit are, in fact, covered by the sale deed of 1755. After careful consideration, their Lordships see no reason to differ from the finding of both the Courts in India on this point.

Issue No. 2 was to the following effect:—

Does the plaintiff prove that his ancestors became owners of the suit lands either through forfeiture or through extinction of the Khatedar's line?

The concurrent finding of both Courts on this issue appears to their Lordships to be that the lands in suit originally belonged to Khatedars or *mirasi* tenants, and on their interests coming to an end in the manner mentioned the Saranjamdar caused his

own name to be put in their place in the Khatas or village papers, and assumed possession of those lands.

The only other material issue remaining to be considered is Issue No. 6, viz.:—

Was the suit land included in the half of the saranjam resumed by the Government?

This is intended to raise the question whether as an effect of the resumption, the Government was entitled to oust plaintiff from the possession of those lands.

The answer depends on the legal effect of the finding on Issue No. 2.

Both the Courts below have answered it in the plaintiff's favour, the District Judge, on the ground that he was bound by the decision of the High Court reported in *Gururao Shrinivas* v. *Secretary of State for India* (1) (then under appeal to this Board and subsequently reversed), and the High Court on the ground that the judgment of this Board in *Secretary of State for India in Council* v. *Laxmibai* (2), though it reversed the decision in *Gururao Shrinivas* v. *Secretary of State for India* (1), had not decided this particular point, with regard to which the High Court was of opinion that decisions of that Court had established the law in the manner contended for on behalf of the plaintiff. One of the learned Judges, Mr. Justice Fawcett, expressed his personal dissent from that view of the law, but considered himself bound by previous decisions of the High Court.

It is necessary, therefore, to consider what are the incidents of a saranjam grant, and how far the same can be gathered from statutes or judicial decisions, in the absence of the deed of grant.

But before doing so their Lordships think it necessary to deal with two points argued by Mr. De Gruyther on the respondent's behalf:—

1. That the onus of proof has been wrongly placed on the plaintiff, who, having been dispossessed, was entitled to succeed unless the Government affirmatively proved its own title to the lands in question.

The plaintiff accepted the onus on the issues as they were framed. Evidence was gone into on that basis, and the parties proceeded to trial evidently on the assumption that the plaintiff could derive title only in one or other of the ways mentioned in paragraphs 2 and 3 of the plaint. But for that, the procedure

1. (1916) I L R 41 B 408.
2. (1922) I L R 47 B 327: L R 50 I A 49: 44 M L J 471 (P C).

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might have been different in many respects, and it appears to their Lordships too late to raise any such question at this stage.

Their Lordships would further observe that no basis of title other than those mentioned in paragraphs 2 and 3 of the plaint has up to the last been suggested on behalf of the plaintiff.

2. The second point was that the village papers, kept by the village officials, having entered the name of the Vinchurkar as Khatedar in respect of the lands in suit, this must be taken to have been acquiesced in and accepted by the Collector on behalf of the Government, and it amounted in effect to a new agreement for a permanent tenancy, which remained unaffected by the subsequent resumption of the *saranjam*. This is a new case not suggested till the last moment, and even if their Lordships were inclined to entertain it (which they are not) it seems to have little foundation in fact. The position of the Saranjamdar enabled him to have complete control over the management of the village and the village officials, and there is no reason to assume that these entries, or the papers themselves, were in any way brought to the cognizance of, or acquiesced in, and much less sanctioned by the Collector.

It is no doubt correct to say, as Mr. Justice Shah does, that "the fact that the Saranjamdar is in a sense a life-tenant does not alter the ordinary incidents of a grant by way of saranjam." But what those ordinary incidents are, must be ascertained, when there is no deed of grant forthcoming, from (*a*) the evidence, if any, in the case; (*b*) from legislative enactments; and (*c*) from judicial decisions. Failing all these, there would be nothing else but general principles of law to apply.

Now we find from Wilson's Glossary that amongst the Mahrattas the term "Saranjam" was applied specially to a temporary assignment of revenue from villages or lands for the support of troops or for personal military service, usually for the life of the grantee; also to grants made to persons appointed to civil offices of the State to enable them to maintain their dignity, and to grants for charitable purposes. These were neither transferable nor hereditary, and were held at the pleasure of the Sovereign. They were divided into two classes, viz. (*a*) grants of revenue only, *i. e.*, of the royal share of the produce of the lands comprised in the grant, and (*b*) grants of the soil itself. It would seem to follow from the nature of saranjams that whether they were grants of the soil itself or of the revenue only of specified lands, they could not and were not meant to interfere with rights in those lands existing previously

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to and at the time of the grant. If and so far as there were occupancy tenants on those lands, they would retain their right of possession (whether it can be called ownership or not is immaterial) but subject to paying the assessed land revenue (*i. e.*, the royal share of the produce) payable before the grant to the Government and after the grant to the grantee. On principle, the grantee would not, unless specially authorised, be able to convey a title larger than his own. He could not convey a permanent title to any portion of the land, either by sale or by lease. Such sale or lease might be good as against himself but would be void as against the grantor.

In the case of a grant of the soil itself, it has been decided by this Board that, on the grant coming to an end, the Government representing the original grantor is entitled to resume actual possession. [*Secretary of State for India in Council* v. *Laxmibai* (2)]. But it is urged that in the case of the other kind of grant, Government can take back only what it granted, viz., the royal share of the produce; in other words, assess the land revenue payable in respect of the land, but it cannot interfere with the possession of the grantee. This would be quite consistent with principle, if the grant made the grantee a charge-holder pure and simple. But if the grant also conveys by implication or otherwise the right to take possession of the land itself under certain circumstances, it is difficult to hold that though the charge might come to an end the possession taken under and by virtue of that charge should still continue, or, as Mr. Justice Fawcett put it, that the incident should survive the grant.

There is no legislative enactment which is applicable in the circumstances of this case. The Saranjam Rules of 1898 do not apply *proprio vigore* as this saranjam was resumed in 1892, and even if they can be held to be merely declaratory of the previous law, they do not throw any light on the question under consideration.

As regards judicial decisions, those with regard to *inams* do not seem to be necessarily applicable. The word *inam* is sometimes vaguely applied to all grants of revenue-free land, without reference to perpetuity or any specified conditions. But it would be unsafe to apply to a peculiar grant like the Mahratta saranjam rules which were held applicable to grants in perpetuity.

2. (1922) I L R 47 B 327: L R 50 I A 49: 44 M L J 471 (P C).

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Mr. Justice Shah refers to what he calls a "long course of decisions" in Bombay as establishing two propositions. The first is admittedly overruled by the decision of this Board in *Secretary of State for India in Council* v. *Laxmibai* (2). His second is that in the case of a saranjam grant of the royal share of the revenue, it is open to the grantee to make the best use of the grant for his own benefit, *i. e.,* to appropriate the lands to his own use, subject to the payment of the royal share of the revenue and to create rights of occupancy in his own favour or in favour of third parties.

On examination it appears that there are only three decisions which directly bear on the point, viz., *Ramchandra Mantri* v. *Venkatrao* (3); *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat* (4) and *Hari Sadashiv* v. *Shaik Ajmudin* (5).

In the first of these cases Mr. Justice Melvill said at p. 598:—

"The Saranjamdar may deal with all unoccupied lands as may be best for the purposes of revenue, and may either cultivate them himself or through tenants."

And it was observed by Batchelor, J., in *Balvant Ramchandra* v. *Secretary of State* (6), that since Mr. Justice Melvill's judgment in 1882 the law in Bombay has always been that a grantee of the revenue is entitled to make such profit as he can out of the unoccupied lands.

But this is very far from holding that the right to make such profit survives the grant and continues after the grant has been resumed.

This construction was, however, placed on Mr. Justice Melvill's words quoted above in *Ganpatrav Trimbak Patwardhan* v. *Ganesh Baji Bhat* (4), where Sargent, C. J., after quoting the passage from Mr. Justice Melvill's judgment in *Ramchandra Mantri* v. *Venkatrao* (3), paraphrased it as follows:—"or, in other words, that the Saranjamdar may acquire occupancy rights which . . . remain unaffected by the resumption of the saranjam, except as to the assessment thenceforth payable to Government."

These observations were not necessary for the decision of that case, and their Lordships are unable to agree that the

2. (1922) I L R 47 B 327: L R 50 I A 49: 44 M L J 471 (P C).
3. (1882) I L R 6 B 598. 4. (1885) I L R 10 B 112.
5. (1886) I L R 11 B 235. 6. (1908) I L R 32 B 432.

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language of Mr. Justice Melvill in *Ramchandra Mantri* v. *Venkatrao* (3) bears the meaning or has the effect attributed to it by Sargent, C. J.

The same observations would apply to the case in *Hari Sadashiv* v. *Shaik Ajmudin* (5). The Government was not a party to either of these cases, and the lands in dispute were held on the evidence in both cases to be the private property (*sheri* lands in the one case and *mirasi* lands in the other) of the grantee. Their Lordships are therefore unable to hold that there is any long course of decisions in the High Court of Bombay laying down with regard to saranjams of this nature the broad rule enunciated by Mr. Justice Shah—that the grantee would be entitled to create *in his own favour* occupancy rights in lands unoccupied at the time the grant was made or held by others then but forfeited on one ground or another during the subsistence of the grant.

The question whether he could create such rights in favour of third persons by virtue of the powers of management above referred to does not arise in this case, and their Lordships refrain from expressing any opinion upon the point. But their Lordships hold that he could not create such rights *in his own favour,* and that when the saranjam was resumed, the Government became entitled to resume not only the land revenue, but also all the rights and benefits that the grantee had secured by virtue of his grant.

Their Lordships will humbly advise His Majesty that this appeal should be decreed with costs and the plaintiff's suit dismissed with costs in both the Courts in India.

Solicitor for appellant: *The Solicitor, India Office.*

Solicitors for respondent: *T. L. Wilson & Co.*

K. J. R. *Appeal allowed.*

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3. (1882) I L R 6 B 598. 5. (1886) I L R 11 B 235.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE AND MR. JUSTICE MADHAVAN NAIR.

Dakshinamurthi Pillai ... *Appellant* and petitioner (Petitioner-claimant)*

v.

Vedamurthy Mudaliar and others ... *Respondents in both (Respondents-Decree-holders).*

Dakshinamurthi Pillai v. Vedamurthy Mudaliar.

*Civil Procedure Code, S 48—Mesne profits to be ascertained in execution—Execution application for recovery of profits ascertained pursuant to—12 years' rule of limitation—Starting point—Section 48 (b)—Order for payment of money at a certain date—Order for mesne profits if an—*Res judicata*—Application for recovery of mesne profits held not barred by 12 years' rule—Effect—Subsequent application for recovery of such profits —Plea of 12 years' rule of limitation—Maintainability.*

A decree directing the mesne profits payable to the plaintiff to be ascertained in execution was affirmed in 1912 by the High Court, which did not interfere with the order regarding the ascertainment of the profits. The profits were as a matter of fact ascertained only in 1917. On an application made in 1924 for the recovery of profits so ascertained, *held,* following *Khulna Loan Co.* v. *Jnanendra Nath Bose,* (1917) 22 C W N 145 (P C), that the application was barred under S. 48, Civil Procedure Code.

Assuming that an order for mesne profits is an order for payment of money, it is not an order for the payment of money at a certain date within the meaning of S. 48 (*b*) of C. P. Code.

An order that a particular application for the recovery of mesne profits awarded by a decree is not barred by the 12 years' rule under S. 48, C. P. Code, is no bar to a plea by the judgment-debtor that a subsequent application for the same purpose is barred by that rule.

Appeal against and the petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act to revise the order of the Court of the Subordinate Judge of Trichinopoly dated 8th November, 1924, in E. A. No. 346 of 1924, in E. P. No. 150 of 1924, in O. S. No. 32 of 1905.

K. G. Srinivasa Aiyar for appellant.

M. S. Ratnasabapathi Mudaliar for respondents.

The Court delivered the following

JUDGMENT :—Since the appellant was a party to the decree under execution and the matter relates to the execution, discharge or satisfaction of the decree, the case is one under S. 47, C. P. Code, and an appeal lies. See *Meyyappa Chetty* v. *Chidambaram Chetty* (1), *Appia Rukmani Ammal* v. *Kuttuvava*

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*C M A No. 447 of 1924
and
C. R. P. No. 941 of 1924. 19th January, 1927.

1. (1920) 39 M L J 603.

Dakshinamurthi Pillai v. Vedamurthy Mudaliar.

Narasimha Aiyar (2) and *Abdul Kasim* v. *Thambusami Pillai* (3). In this view it is open to a party to the decree to raise the question of limitation and the Lower Court was not justified in refusing to allow that point to be raised.

We remand the case for a finding on the issue whether E. P. No. 150 of 1924 (4th April, 1924) is within time.

Fresh evidence may be adduced on both sides. Finding should be submitted within six weeks and ten days will be allowed for filing objections.

Note :—The case on the merits has been argued but not decided by us.

In compliance with the order contained in the above judgment the Subordinate Judge of Trichinopoly submitted the following

FINDING :—"Whether the E. P. No 150 of 1924, dated 4th April, 1924, is within time".

I therefore hold that E. P. No. 150 of 1924 was within time and submit a finding accordingly.

JUDGMENT :—The first point for decision in this appeal is whether E. P. No. 150 of 1924 is barred by the 12 years' rule under S. 48, C. P. Code. We remanded the case to the Lower Court for a finding and the Lower Court has returned a finding that it is not barred. We are not able, on the state of the law as it stands at present, to agree.

The decree was passed on 11th February, 1907 and in the decree it was stated that mesne profits were to be ascertained in execution. The first appeal against that decision was disposed of by this Court on 23rd February, 1911 and it did not interfere with the order regarding the ascertaining of mesne profits. In 1917 an execution petition for the ascertainment of mesne profits was put in and an order thereon was passed on 14th November, 1917. On 4th April, 1924 an Execution Petition No. 150 of 1924, the last of a series of execution petitions, was put in for the recovery of the amount of mesne profits ascertained. This execution petition is obviously more than 12 years after the passing of the High Court decree, and under S. 48 of the Civil Procedure Code it would *prima facie* be out of time. Two arguments, however, were put before us to show that it was not out of time: (1) that

2. (1921) 41 M L J 54. 3. (1916) 5 L W 701.

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"the date of the decree" really means the date when the decree becomes executable, and it is argued that in the present case that would be 12 years from the date of ascertainment of the mesne profits, 12 years from 1917, and for this position *Aiyasami Aiyar* v. *Venkatachela Mudali* (4) is relied upon. The second argument is that the order ascertaining the mesne profits is a 'subsequent order' within the meaning of S. 48 (*b*), an order for the payment of money. We think the latter contention cannot stand against the Full Bench desision in *Aiyasami Aiyar* v. *Venkatachela Mudali* (4) (see pp. 996 and 1002). It is perhaps possible to say that an order for mesne profits is an order for payment of money; but it is not an order for the payment of money *on a certain date*, according to the interpretation of that phrase by that Full Bench decision. Certain *obiter dicta* by Devadoss and Waller, JJ., in *Swaminatha Odayar* v. *Thiagarajaswami Odayar* (5), Phillips, J., in *Nawab Shuja-ul-Mulk Bahadur* v. *Umir-ul-Umra Bahadur* (6) would seem to indicate that such an order might be treated as an order for the payment of money at a certain date within the purview of S. 48(1)(*b*), but we think that the Full Bench decision must govern this point. As to the first point the contention seems to us reasonable and has been in fact laid down in general terms by the Privy Council in a ruling in *Rameshwar Singh* v. *Homeshwar Singh* (7). But there is another Privy Council case *Khulna Loan Co.* v. *Jnanendra Nath Bose*(8) which stands directly in the way. That judgment, although brief, adopts the arguments of the High Court of Calcutta which lay down very definitely that S. 48 means that no execution petition can be put in after 12 years of the date of the decree, the date being the date prescribed under R. 7, O. 20. We feel that it is a reasonable view that the 12 years should run from the time when the relief asked for was ascertained and decided, which is the view contained in the Privy Council decision in *Rameshvar Singh* v. *Homeshvar Singh* (6). But that was a case under Art. 182 of the Limitation Act, while the Calcutta Weekly Notes case is directly on S. 48, Civil Procedure Code, which we now have to interpret. The only ground for differentiation between

4. (1916) I L R 40 M 989: 31 M L J 513 (F B).
5. (1925) 23 L W 26. 6. (1925) 49 M L J 498.
7. (1920) L R 48 I A 17 : 40 M L J 1 (P C).
8. (1917) 22 C W N 145 (P C).

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the Calcutta Weekly Notes case and the present is that the former was a mortgage decree in which the sum to be recovered was definitely ascertained when the decree was passed, and the decree, as far as it related to the recovery of money was immediately executable, whereas in the present case, as the decree did not ascertain the amount of mesne profits, it was not immediately executable for money. But this style of argument was advanced before the Calcutta High Court in the Weekly Notes case and was not accepted by it or their Lordships of the Privy Council. We must, constrained by the ruling of the Privy Council, hold that E. P. No. 150 of 1924 is barred by time. We have been asked to refer the case to a Full Bench in view of the general importance of the question raised, but, as the Privy Council ruling must, until it is altered, govern the law in this country, and as the question is only acute in cases where the original decree was passed under the old Civil Procedure Code, since now the amount of mesne profits is ascertained in the suit and embodied in a final decree, we decline to refer the matter as suggested.

An argument on the footing of *res judicata* was advanced by respondent that since, in a prior E. P. No. 139 of 1923, dated 18th July, 1923 which was also put in more than 12 years from date of High Court decree, no objection on the ground of limitation had been taken by appellant, he was barred by *res judicata* from pleading that bar to any subsequent E. P. We are unable to follow this argument. All that was implicitly decided on E. P. No. 139 of 1923 was that that petition was not barred by the 12 years' rule. That decision cannot for ever remove the operation of S. 48, Civil Procedure Code, out of the way of all future E. Ps. There is no substance in this contention.

It is unnecessary to go into the merits of the E. P. We hold that it is barred by S. 48, Civil Procedure Code. We must allow the appeal and dismiss E. P. No. 150 of 1924 with costs to appellant in both Courts.

No order is necessary on the connected Civil Revision Petition.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER AND MR. JUSTICE MADHAVAN NAIR.

Nune Ayyannamma ... *Appellant** (*Plaintiff*)

v.

Valloori Ramaswami ... *Respondent* (*Defendant*).

Ayyannamma *v.* Ramaswami.

Civil Procedure Code, O. 23, R. 3—Adjustment—Award passed in pending suit without intervention of Court if may be regarded as an—S. 89 of Civil Procedure Code—Effect.

An award passed in a pending suit without the intervention of the Court is not invalid, and may be regarded as an adjustment under O. 23, R. 3 of the Civil Procedure Code. S. 89, C. P. Code, is no bar to the award being so regarded.

Second Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. No. 111 of 1923 (A. S. No. 15 of 1923 on the file of the District Court of Godavari) preferred against the decree of the Court of the Additional District Munsif of Rajahmundry in O. S. No. 274 of 1920 (O. S. No. 312 of 1920 on the file of the Court of the District Munsif of Ramachandrapur).

C. Rama Rao for appellant.

P. V. Rangaram for respondent,

The Court delivered the following

JUDGMENT :—The facts are briefly these. The plaintiff instituted a suit to establish her right to the site marked *B* in the plan and to direct the defendant to close the gateway *D* opened by him into the said site and also for a permanent injunction to restrain the defendant from opening the gateway. The defendant raised various contentions denying the plaintiff's exclusive right. After the framing of the issues the parties entered into a muchilika Ex. I by which the matters concerned in the suit and other matters in which other parties also were interested were referred to arbitration. The arbitrator made an award Ex. II. The defendant filed it in Court and asked for a decree in terms of it. On objections being raised by the plaintiff an additional issue was raised as to whether there had been a lawful adjustment or compromise. The District Munsif holding that there was one, dismissed the plaintiff's suit. His decision was confirmed in appeal. The plaintiff has now preferred this second appeal against the Lower Court's decree.

*S. A. No. 552 of 1924. 11th February, 1927.

The main point argued by the learned vakil for the appellant is based upon S. 89 of the Civil Procedure Code. According to that section which has been newly introduced in the Civil Procedure Code of 1908

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899 or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second schedule."

It is argued that in view of the provisions of this section, the Lower Courts ought to have held that the reference to arbitration in a pending suit except in the manner provided by paragraphs 1 to 16 of the second schedule to the Civil Procedure Code is not warranted by law and that, therefore, the award made in this case is invalid and unenforceable. In reply it is contended that an award made without the intervention of Court in a pending suit should be regarded as an adjustment under O. 23, R. 3 of the Civil Procedure Code and that the words "any other law for the time being in force" in S. 89 are wide enough to include such an adjustment.

On this question there is a great diversity of judicial opinion amongst the various High Courts. The most recent decision of the Bombay High Court is reported in *Manilal Motilal* v. *Gokaldas Rowji* (1). This decision overruling a prior decision of the same Court reported in *Shavakshaw* v. *Tyab Haji Ayub* (2) held that an award could not be regarded as invalid merely because it was made in a reference by parties to the suit without the intervention of the Court and that when the award was brought to its notice the Court should try the issue whether it is not binding on the parties under the general principle of the law of contract by proceeding under O. 23, R. 3. The Calcutta High Court has expressly dissented from this view. In *Amar Chand Chamaria* v. *Banwari Lall Rakshit* (3) it was held that where parties have recourse to private arbitration without the consent of the Court in a pending suit the award cannot be enforced under O. 23, R. 3 of the Civil Procedure Code. See also *The Dekari Tea Co., Ltd.* v. *The India General Steam Navigation Co., Ltd.* (4) and *Ram Pratap Chamria* v. *Durga Prasad Chamria* (5). In a recent Full Bench case the Allahabad High Court has dissented from

1. (1920) I L R 45 B 245. 2. (1916) I L R 40 B 386.
3. (1921) I L R 49 C 608. 4. (1920) 25 C W N 127.
5. (1923) 28 C W N 424.

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the Calcutta rulings and followed the decision of the Bombay High Court in *Manilal Motilal* v. *Gokaldas Rowji* (1). In *Hari Parshad* v. *Soogni Devi* (6) it was held that an award in a pending suit made without the intervention of the Court cannot be regarded as an adjustment under O. 23, R. 3 if it is not agreed to by all the parties. Our own High Court has always been of the opinion that an award passed in a pending suit without the intervention of the Court may be regarded as an adjustment under O. 23, R. 3. To take the earliest case in *Lakshmana Chetty* v. *Chinnathambi Chetty* (7) no express decision on the question was given, but the Court held that the award in that case could not be given effect to as the reference to arbitration was not lawful. In *Chinna Venkatasami Naicken* v. *Venkatasami Naicken* (8) the opinion is indicated that an award passed without the intervention of the Court would be valid as an adjustment under O. 23, R. 3 of the Civil Procedure Code. In *Alagu Pillai* v. *Mayilappa Pillai* (9) this decision is quoted as an authority against the proposition that in cases like the present the Court is bound to act under the second schedule and not under O. 23, R. 3. *Chintalapalli Chinna Dorayya* v. *Chintalapalli Venkanna* (10) is another decision in favour of the view that S. 89 of the Civil Procedure Code is not a bar to the application of O. 23, R. 3 to cases in which there has been a reference to arbitration. *Virabhadra Gowd* v. *Kalyani Gangamma* (11) also supports the same view. The most recent decision of this Court is a decision by a single Judge in S. A. No. 882 of 1925 where also the prior decisions of this Court have been followed in preference to the view expressed in *Amar Chand Chamaria* v. *Banwari Lall Rakshit* (3).

In the present state of authorities we are asked by the learned vakil for the appellant to accept the decisions of the Calcutta High Court as laying down the correct law. He has also drawn our attention to the Privy Council decision in *Ghulam Khan* v. *Muhammad Hassan* (12) which he strongly relies upon in support of the Calcutta view. In the view that we take of this question it is not necessary to discuss the appellant's arguments in detail. We will only say that the arguments based on the Calcutta decisions are not without force, having

1. (1920) I L R 45 B 245.
3. (1921) I L R 49 C 608.
6. (1920) 3 Lah L J 162.
7. (1900) I L R 24 M 326.
8. (1919) I L R 42 M 625 : 36 M L J 291.
9. (1923) 45 M L J 76.
10. (1923) 76 I C 502.
11. A I R 1926 Mad. 1211.
12. (1901) I L R 29 C 167 : 12 M L J 77 (P C).

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regard to S. 89 of the Civil Procedure Code; but the contrary view has been consistently held by this Court in various cases as pointed out above. The question is essentially one relating to procedure. Our Court has taken a definite position with regard to this matter and it has been followed for a considerable number of years. We think that this long-standing practice should not be disturbed. In these circumstances we are not prepared to depart from the procedure accepted all along as correct by our Court or to refer the matter to a Full Bench.

We must therefore overrule the appellant's arguments on this point and hear the case on the merits.

[This Second Appeal coming on for final hearing the Court delivered the following:—]

JUDGMENT :—The only point urged is that the sale deed on which the plaintiff relied was not before the arbitrator. The evidence, however, is that the arbitrator was informed of its contents and examined witnesses. There is no ground for interference with the award.

The second appeal is dismissed with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER AND MR. JUSTICE MADHAVAN NAIR.

Suravarapu Venkata Subramanya Sastri ... *Appellant* (Appellant in S. A. No. 1564 of 1922 on the file of the High Court—Plaintiff)*

v.

Yalla Bhiravaswami and another ... *Respondents (Respondents in do. 1st Defendant's Legal Representatives).*

Venkata Subramanya Sastri v. Bhiravaswami.

Limitation Act, S. 25—Deed bearing native date—Limitation in case of—Computation—Calendar year or month—Lunar year or month—Computation according to—Intention of parties that computation was to be according to lunar months or year—If overrides section.

A cowle deed executed several days after the beginning of the Telugu year Khara was to operate for "16 years from this year to the year Parabhava inclusive". The parties to the deed meant it to run for 16 Telugu years, and, as the deed was executed several days after the beginning of the Telugu year Khara, if the lease was to expire at the end of Parabhava, the full term would have been something less than 16 Telugu years.

*L. P. A. No. 124 of 1925. 31st March, 1927.

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Held, that, notwithstanding that the intention of the parties was that the cowle was to run for 16 Telugu years from a particular date, for the purpose of limitation, the years must, under S. 25 of the Limitation Act, be deemed to be Gregorian Calendar years.

S. 25 is absolute, and there is no saving of cases in which it appears on the face of the contract that lunar months were intended by the parties.

Rungo Bujaji v. *Babaji*, (1881) I L R 6 B 83 followed.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Phillips, dated the 1st day of May, 1925 and passed in Second Appeal No. 1564 of 1922 preferred to the High Court against the decree of the Court of the Subordinate Judge of Cocanada in A. S. No. 37 of 1921 preferred against the decree of the Court of the District Munsif of Cocanada in O. S. No. 265 of 1919.

G. Lakshmanna for appellant.

C. Rama Rao for respondents.

The Court delivered the following

JUDGMENT :—This appeal raises a question of limitation. Ex. D is a cowle deed executed on 2nd May, 1891, which was to operate for a period of 16 years. The suit was filed on 2nd May, 1919. The District Munsif found that it was in time. The Sub-Judge in first appeal was of opinion that the lease expired at the end of the year Parabhava—about 13th April, 1917 —and held that the suit was out of time. In Second Appeal Phillips, J., agreed with the Subordinate Judge.

There is some controversy as to the correct translation of the relevant portion of the deed. Mr. Lakshmanna for the appellant contends that the proper translation is "from this year Parabhava year included for 16 years". Mr. Rama Rao, on the other side, accepts the version adopted by the Subordinate Judge "from this year to Parabhava inclusive 16 years". The translation in the printed record is "16 years, *i. e.*, from this year till the end of the Telugu year Parabhava". We have had a fourth translation made in this Court and it is "for 16 years from this year to the year Parabhava inclusive". For the purpose of argument we will assume that the third version "16 years from this year till the end of the Telugu year Parabhava" is correct and that the parties to the deed meant it to run for 16 Telugu years. It was, of course, executed several days after the beginning of the Telugu year Khara and, if the lease was to expire at the end of Parabhava, the full term would have been something less than 16 Telugu years. Mr. Lakshmanna takes his stand on S. 25 of the Limitation Act. That section reads as follows:

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"All instruments shall, for the purpose of this Act, be deemed to be made with reference to the Gregorian Calendar".

Nothing could be more unconditional. If a question of limitation arises, the instrument must be deemed to have been made with reference to the Gregorian Calendar, the intention of the parties being quite immaterial. The rule is an obvious rule of convenience in a country like this, where there are many calendars, each of which divides the year in a different manner. We have been referred to no decision of this Court in which S. 25 of the Limitation Act has been considered. The earliest case cited before us comes from Bombay, *Nilkantha* v. *Dattatraya* (1). The head-note runs:-

"Where a bond bears a native date only, and is made payable after a certain time, that time, whether denoted by the month or the year, is to be computed according to the Gregorian Calendar."

The next is also a Bombay case, *Rungo Bujaji* v. *Babaji*(2).The note was dated Ashad Vadya 13th, Shake 1799, corresponding with 7th August 1877. The stipulation was for payment "in the month Kartik, Shake 1799, that is to say in 4 months" and the suit was filed on 6th December, 1880. If the 4 months' period was to be computed with reference to the Indian Calendar the suit was 4 days out of time. With reference to the Gregorian it was in time, although the 6th December did not fall within the month of Kartik. The High Court agreed that the true construction of the note was that the maker was to pay within 4 lunar months, *i. e.,* in the month of Kartik, but held that S. 25 was absolute and that there was no saving of cases in which it appeared on the face of the contract that lunar months were intended by the parties. This decision was followed by Beverley, J., in *Latifunnessa* v. *Dhan Kunwar* (3). The mortgage bond in question was dated 14th June, 1876 and stipulated that the money should be repaid "in the month of Jeyth 1289 Fasli, being a period of 6 years". The last day of Jeyth 1289 corresponded with the 1st June, 1882, the period of 6 years ended on 14th June, 1882 and the suit was brought on 12th June, 1894. Beverley, J., ruled that the money fell due on the 14th June, 1882 and that the suit was in time. Ameer Ali, J., doubted the correctness of the ruling, but was not prepared to dissent from it. He thought that the question was one of the intention of the parties and that S. 25 of the Limitation Act

1. (1879) I L R 4 B 103. 2. (1881) I L R 6 B 83.
3. (1897) I L R 24 C 382.

Venkata Subramanya Sastri v. Bhirava-swami.

did not apply. If, as we think, S. 25 did apply, the question of the intention of the parties was irrelevant.

A different view has been taken in two cases from Allahabad. In *Dwarka Prasad* v. *Raja Ram* (4) the decisions above referred to were dissented from. The deed under consideration which was dated 24th July, 1892, provided that the mortgage amount should be repayable in 8 years in 8 instalments, each instalment being payable on Magh Sudi Puranmashi. The 8th Magh Sudi Puranmashi fell on 14th February, 1900 and the suit was filed on 19th July, 1912. The Court held that the whole question turned on the intention of the parties, which was that the last payment now to fall due on 14th February and that S. 25 did not apply. With great respect we are unable to see why S. 25 did not apply. The mortgage was to run for 8 years and those years, under S. 25, had to be computed according to the Gregorian Calendar. The other Allahabad case is reported in *Roshan Lal* v. *Chaudhri Bashir Ahmad* (5). The bond in question was dated 10th July, 1908, and the principal was repayable in three years. Interest was to be paid every six months calculated according to the Hindi Calendar. The suit was filed on 10th January, 1921. If six months of the Hindi Calendar were added to the date of the bond, limitation began to run before 10th January, 1909. If, on the other hand, 6 Gregorian Calendar months were added, the suit was in time. The Court held that it was a matter of construction in every case. The true principle was laid down to be this "If the starting point is to be calculated as so many months or so many years from a particular date, that point must be calculated according to the Gregorian Calendar. On the other hand, if the starting point is otherwise fixed by the stipulation itself, the Court cannot apply S. 25 of the Limitation Act." In the result, the Court found that the suit was out of time. On the principle laid down we think that it was in time. The starting point was fixed by the deed itself. The first instalment of interest had to be paid in six months from 10th July, 1908 but was not paid. Time therefore began to run from 10th January, 1909. That the parties intended something else is beside the point, as was observed in *Rungo Bujaji* v. *Babaji* (2) already referred to. S. 25 of the Limitation Act is unconditional. The interest had to be paid in six months from a

2. (1881) I L R 6 B 83. 4. (1915) 13 A L J 486.
5. (1924) I L R 47 A 66.

Venkata Subramanya Sastri v. Bhirava-swami.

particular date and that period had, for the purpose of limitation, to be calculated according to the Gregorian Calendar. In this case a Calcutta ruling was referred to with approval—*South British Fire and Marine Insurance Co.* v. *Brojo Nath Saha*(6). The suit was brought on an insurance policy, which provided, *inter alia,* that no suit on a claim should be sustainable unless it were begun within six months after the loss or damage. The Court, held that, nothwithstanding the Indian Limitation Act, the term "month" meant in India, as in England, a "lunar" and not "a calendar month". The question, however, did not really arise, as the suit was out of time whichever method of computation was adopted. The learned Chief Justice thought that S. 25 had no bearing on the question of the meaning of the word "month" in a contract drawn up in English, but, when a question of limitation arose, S. 25 had, we think, to be applied and it lays down that, in such a connection, a month must be deemed to be a Gregorian Calendar month and nothing else. We are clearly of opinion that the law has been correctly laid down in *Rungo Bujaji* v. *Babaji* (2). The cowle was to run for 16 Telugu years from a particular date but, for the purpose of limitation, the years have to be deemed to be Gregorian Calendar years. The suit was therefore in time. The appeal is allowed. The decree of the District Munsif is restored. The decision turning on a question of law which does not appear to have been argued before the Court below, we make no order for costs in this Court. The appellant will have his costs in the Courts below.

A. S. V. *Appeal allowed*

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2. (1881) I L R 6 B 83. 6. (1909) I L R 36 C 516.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

Vepery Kotilingam Mudaliar (dead) and another ... *Petitioners** (*Petitioners and his L. Rs.*)

v.

The Board of Commissioners for Hindu Religious Endowments, Madras ... *Respondents* (*Respts.*).

Kotilingam Mudaliar v. Board of Commissioners for Hindu Religious Endowments, Madras

Civil Procedure Code, S. 115—Order assessing Court-fee payable and directing it to be paid within a certain time—Revision.

An order of a Court assessing the Court-fee payable on a petition or plaint and directing it to be paid within a certain time is not subject to revision under S. 115 of the Civil Procedure Code.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the judgment of the District Court of Nellore in O. P. No. 24 of 1926.

A. Venkatasubba Rao for petitioners.

P. Venkataramana Rao for respondents.

The Court delivered the following

JUDGMENT :—This is a Civil Revision Petition against an order of the District Judge of Nellore assessing the Court-fee payable upon a petition under S. 80 (2) of the Hindu Religious Endowments Act and allowing the petitioners a fortnight within which to pay it The respondent raises the preliminary objection that an order of this nature is not subject to revision by this Court under S. 115 of Civil Procedure Code. It is indisputable that the Court had jurisdiction to assess Court-fee under S. 12 of the Court-Fees Act, and it appears to me to involve a confusion of thought to say that because an order which the Court had jurisdiction to pass resulted in the rejection of the application, therefore, assuming that the order was wrong it was passed without jurisdiction. But it is unnecessary for me to pursue this question, which I have recently dealt with in C. R. P. No. 451 of 1926, because I think that the petition must fail upon another ground. S. 115 requires that an order which it is sought to revise amounts to deciding a case. Now if the "case" comprises no more than a direction to pay the Court-fee within a certain time, as it does it here, it is impossible without anticipating what has not yet occurred, to say that the Court

*C. R. P. No. 599 of 1926. 26th January, 1927.

Kotilingam Mudaliar v. Board of Commissioners for Hindu Religious Endowments, Madras.

has refused to exercise its jurisdiction to entertain the petition. A different set of consideration might arise if the Court, upon failure to make the payment, has dismissed the petition. It may then be arguable (as was held by Oldfield, J.) in *Sudali Muthu Pillai* v. *Sudali Muthu Pillai* (1) that the order of dismissal (in that case an appeal) was a refusal to exercise jurisdiction The present case appears to be in all essential respects identical with that decided by Phillips, J., in *Acha* v. *Sankaran* (2) and I am in agreement with the view which I infer was his, that so far as matters have gone at present, no question of refusal to exercise jurisdiction has arisen.

This Civil Revision Petition is accordingly dismissed with costs.

N. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

P. C. Muthu Chettiar ... *Appellant** (*Plaintiff*)

v.

Rengappa Naidu and others ... *Respondents* (*Defts.*).

Muthu Chettiar v. Rengappa Naidu.

Limitation Act, Art. 132—Applicability—Mortgage debt—Surety on simple money bond for payment of—Suit against—Limitation.

The suit was to enforce a mortgage against the mortgagors and against a person who was a surety on a simple money bond for the payment of the mortgage debt by the mortgagors. The surety undertook to pay "if the principal and interest be not paid as per the mortgage bond."

Held, that the suit having been brought more than six years after the expiry of the mortgage period, it was barred as against the surety.

The suit against the surety on a mere money bond is not a suit for payment of money charged on immoveable property within the meaning of Art. 132 of the Limitation Act.

Second Appeal against the decree of the Court of the 1st Additional Subordinate Judge of Madura in A. S. No. 6 of 1924 (A. S. No. 107 of 1923 on the file of the District Court, Madura) preferred against the decree of the Court of the District Munsif of Tirumangalam in O. S. No. 220 of 1922.

T. V. Ramamurti for appellant.

A. V. Viswanatha Sastri for 3rd respondent.

The Court delivered the following

JUDGMENT :—The point for decision is what is the Article of Limitation applicable to the cause of action against 3rd

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*S. A. No. 1259 of 1924. 24th March, 1927.

1. (1922) 17 L W 623. 2. (1926) 50 M L J 497.

Muthu Chettiar v. Rengappa Naidu.

defendant. He was a surety on a simple money bond for the payment of the suit mortgage debt by defendants 1 and 2. He undertook to pay "if the principal and interest be not paid as per that bond," *i. e.*, Ex. A. Under Ex. A the period of the mortgage was ten months, but by a residuary clause it was stated that in default the mortgagor will pay the principal and the accruing interest "whenever you demand". It is pleaded that, as the mortgagor was bound to pay "on demand" at any time, the surety is equally liable. But plaintiff never at any time pleaded that he made any demand under this clause, and in his plaint has clearly stated only one date for his cause of action, viz., the date of expiry of the mortgage period. Hence there has been no breach of the contract to pay on demand, no failure by the mortgagor to pay as per that clause in the bond and therefore no liablity on account of any such failure has fallen upon the surety.

Hence plaintiff is driven back on the limitation period applicable on the footing that the failure to pay as per the bond was only on the expiry of the mortgage period, viz., in June, 1915. The suit was filed on 31st March, 1922. Hence it is out of time unless plaintiff can call in aid an Article of the Limitation Act which gives a period of more than 6 years. He argues that Art. 132 applies, contending that the suit as against the surety is a suit for payment of money charged upon immoveable property, because S. 128, Indian Contract Act, makes the liability of the surety co-extensive with that of the principal. Even so, I cannot see how that converts a suit against the surety on a mere money bond into a suit for payment of money charged upon immoveable property.

Respondent raised a preliminary objection that no second appeal lies because the claim against the surety, which is now the only claim agitated, is of a small cause nature. I do not consider it necessary to go into that, as appellant's case fails on the merits.

I see no reason to interfere and dismiss the appeal with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Murugan and others ... *Petitioners** (*Complainants*)

v.

Gutha Rami Naidu ... *Respondent* (*Accused*).

Murugan v. Rami Naidu.

Criminal Procedure Code, S. 344—Magistrate's power to stay proceedings in his own Court—False charge made to the Police—Subsequent complaint to Sub-Magistrate—Sub-Magistrate endorsing written statement upon it—Order allowing Police to strike the case off their file as false—No order on the complaint—Power of Sub-divisional Magistrate to entertain a complaint for false charge without the complaint of the Sub-Magistrate.

Under S. 344 of the Criminal Procedure Code, a Sub-divisional Magistrate can only adjourn a case from time to time but has no power to stay proceedings in his own Court. The counter-petitioner accused certain persons of theft before the Village Headman. The case was duly reported by the Headman to the Police who reported it to be false. Then the counter-petitioner put in a complaint before the Sub-Magistrate and the Sub-Magistrate recorded a written statement upon it. He allowed the prayer of the Police to strike the case off their file as being false but passed no further orders on the complaint of the counter-petitioner. The counter-petitioner was charged before the Sub-divisional Magistrate with an offence under S. 211 of the Indian Penal Code.

Held, that the Sub-divisional Magistrate had no jurisdiction to enquire into the offence except on the complaint of the Sub-Magistrate under S. 476 of the Criminal Procedure Code.

Tayebulla v. *Emperor,* (1916) I L R 43 Cal 1152 and *Brown* v. *Ananda Lal Mullick,* (1916) I L R 44 Cal. 650 followed.

Ramaswami v. *The Queen-Empress,* (1884) I L R 7 Mad. 292 not followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Ranipet in C. C. No. 20 of 1926, dated 24th August, 1926.

K. S. Jayarama Aiyar for petitioners.

The Public Prosecutor for the Crown.

Dr. S. Swaminadhan for respondent.

The Court made the following

ORDER :—The petitioners seek to revise an order by the Sub-divisional Magistrate of Ranipet staying further proceedings in a case upon his file brought under S. 211, Indian Penal Code. The order might be set aside on the short ground that the Sub-divisional Magistrate has no power to stay proceedings in his own Court. Under S. 344, Criminal Pro-

*Cr. R. Case No. 844 of 1926.
(Cr. R. Petition No. 733 of 1926). 25th March, 1927.

Murugan v Rami Naidu.

cedure Code, he may adjourn a case from time to time but that is not what he has done in the present instance. The counter-petitioner has been charged with having falsely accused certain persons of theft before the Village Headman, an offence punishable under S. 211. The case was duly reported by the Headman to the Police who referred it as false. Then the counter-petitioner being apprised of that fact put in a complaint before the Sub-Magistrate and the Sub-Magistrate recorded a written statement upon it. He allowed the prayer of the Police to strike the case off their file, but apparently passed no further orders on the complaint of the counter-petitioner. It was urged at the trial before the Sub-divisional Magistrate that inasmuch as the false charge was committed in a proceeding in the Sub-Magistrate's Court, to wit the complaint, he had no jurisdiction to enquire into the matter except on the complaint of the Sub-Magistrate under S. 476. He declined to go into this question and the matter was taken up to the learned Sessions Judge who informed him that it was a question which could not be postponed and that under the law if the offence was committed in the Sub-Magistrate's Court the complaint of the Sub-Magistrate would be necessary. The Sub-divisional Magistrate met this suggestion by finding that as a matter of fact there had been no complaint entertained by the Sub-Magistrate. His theory seems to be that on receiving the counter-petitioner's complaint the Sub-Magistrate merely threw it aside and what purports to be his statement endorsed on its back was not a sworn statement. It cannot be discovered from the record now before the Court how the Sub-divisional Magistrate came to hold that it was not a sworn statement. The ordinary presumption that a Magistrate does his duty would lead one to infer that it was a sworn statement, and Mr. Jayarama Aiyar concedes that it must be accepted as such. In these circumstances, the Sub-Magistrate clearly took cognizance of the complaint and any offence in regard to that complaint could only be prosecuted after action taken by him under S. 476. But it is now argued that it is unnecessary to consider this complaint at all and that the prosecution can proceed on the false charge made to the Village Headman and through him to the Police ignoring the subsequent complaint by the Sub-Magistrate altogether. This proposition is based on the authority of *Ramasami* v. *The Queen-Empress* (1),

1. (1884) I L R 7 M 292.

where no doubt it is observed that the prosecution did not require any sanction as the appellant was tried for making a false charge to the Police. This very point has been considered very fully in *Tayebulla* v. *Emperor* (2) and *Brown* v. *Ananda Lal Mullick* (3) and there can be no doubt that when the person who preferred a false charge to the Police has also taken the same facts by way of complaint to the Magistrate, before that person can be prosecuted the complaint of the Magistrate is necessary. It would be a most extraordinary result if while the Magistrate was still engaged in trying a complaint and possibly inclined to believe the complainant, the complainant could himself be put into the dock in another proceeding on the allegation that he had preferred a false charge to the Police. I do not find therefore that the opinion of the Sub-divisional Magistrate can be supported on this ground. Accordingly I quash the proceedings in C. C. No. 20 of 1926 on his file as having been taken without cognizance.

Murugan v. Rami Naidu.

N. S. *Petition allowed and proceedings of the Magistrate quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[IN THE ORDINARY ORIGINAL CIVIL JURISDICTION.]

PRESENT :—MR. JUSTICE BEASLEY.

T. S. Swaminatha Aiyar and others ... *Plaintiffs**

v.

M. Guruswami Mudaliar and others ... *Defendants.*

Swaminatha Aiyar v. Guruswami Mudaliar.

Court-Fees Act (V of 1922), S. 5—Suit on the Original Side of the High Court—Decision of Taxing Officer as to Court-fees payable—Finality of—Power of Court to interfere with his decision—Madras High Court-Fees Rules, 1925, Appendix II—Suit on the Original Side of the High Court under S. 92 of the Civil Procedure Code—If incapable of valuation—Court-fee payable on such suit.

The decision of the Taxing Officer as regards the Court-fee payable on a plaint in a suit under S. 92 of the Civil Procedure Code filed on the Original Side of the High Court is final under S. 5 of the Court-Fees Act and the Court has no power whatever to interfere with his decision.

Obiter· A suit under S. 92 of the Civil Procedure Code is incapable of valuation; but all suits irrespective of whether they are capable of valuation fall within the scope of the Madras High Court-Fees Rules, 1925, App. II

*C. S. No. 250 of 1927. 28th April, 1927.

2. (1916) I L R 43 C 1152. 3. (1916) I L R 44 C 650.

Swaminatha Aiyar v. Guruswami Mudaliar.

and consequently must have paid in respect of them the minimum Court-fee of Rs. 150.

C. Veeraraghava Aiyar for plaintiffs.

The Advocate-General (*T. R. Venkatarama Sastri*) for Government.

The Court delivered the following

JUDGMENT :—The plaintiffs filed a suit in this High Court under S. 92 of the Code of Civil Procedure and presented the plaint bearing a five-rupee stamp. The Taxing Officer has rejected the plaint as insufficiently stamped as in his opinion the plaint should have been stamped with a hundred and fifty rupees stamp as provided for in the High Court-Fees Rules, 1925, Appendix II, which provides that in respect of a plaint or special case under O. 36 of the Code of Civil Procedure where the value of the subject-matter does not exceed Rs. 10,000 a fee of Rs.150 is to be levied. The plaintiffs contend that this is a suit in respect of which the relief claimed is incapable of valuation and that the Court-fees leviable by reason of the High Court-Fees Rules, 1925, Appendix II cannot be applied to such a case. The learned Advocate-General in support of the Taxing Officer's decision, however, contends firstly, that the decision of the Taxing Officer is final and cannot be called in question here and secondly, that the Taxing Officer is right in having rejected the plaint as insufficiently stamped and that the proper fee payable is Rs. 150. I will deal first with the contention of the learned Advocate-General that the Taxing Officer's decision is final. S. 5 of the Court-Fees Act of 1870 provides that

"when any difference arises between the officer whose duty it is to see that any fee is paid under this Chapter and any suitor or attorney as to the necessity of paying a fee or the amount thereof the question shall, when the difference arises in any of the High Courts, be referred to the Taxing Officer whose decision thereon shall be final except when the question is in his opinion one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf."

Mr. C. Veeraraghava Aiyar argues that S. 5 of the Court-Fees Act of 1870 does not apply to this case because that section provides for differences which arise as to the fee to be paid under that chapter and admittedly S. 4 of that chapter does not apply to fees to be paid in cases before the High Court

in its ordinary original civil jurisdiction and that therefore the decision of the Taxing Officer rejecting the plaint cannot be final and he argues that R. 542, sub-rule 2 (37) (*b*) of the Original Side Rules entitles the plaintiff to bring this matter up before a Judge. That rule is as follows:—

"Any party desiring to have any question which has been decided by the Deputy Registrar whether contested or not referred to a Judge may apply to the Court within 8 days of the issuing of the order complained of or within such further period as the Judge for sufficient cause may allow."

There are, however, many reported cases which clearly lay down that in such a matter as this the decision of the Taxing Officer is final. In the case of *In the Goods of Bhubaneswar Trigunait, deceased, Mukteswar Trigunait and others* (1) a Hindu father and his brother and two sons lived together in a joint Mitakshara family. The father died intestate leaving certain money in a bank. The brother and the two sons applied for Letters of Administration with a certificate from the Registrar who as the Taxing Officer under R. 4 of Chapter XXXV of the Rules and Orders of the Calcutta High Court certified the exemption of the Court-fees as the property was held in trust not beneficially or with general power to confer a beneficial interest. It was held on appeal that the decision of the Taxing Officer under R. 4 of Chapter XXXV was final by virtue of S. 5 of the Court-Fees Act and could not be reviewed under S. 19 (1). It was further held that the jurisdiction of the Taxing Officer does not arise upon a difference of opinion between an office clerk and a suitor and upon some sort of formal reference to decide that dispute. It is enough that the Taxing Officer has brought his mind to bear on the question and has decided it. On page 882 Rankin, J., says as follows:—

"It would appear that in a matter so important as a claim to exemption from probate duty, the ordinary Court clerk or officer whose duty it is to see that Court-fees are paid is not authorised in this Court to allow such claims on his own responsibility and that all such claims are required to be queried and referred to the Taxing Officer. I think this involves that the Taxing Officer's decision is a final decision under S. 5 and that in this case the learned Judge had no authority to review it under S. 19 (1)".

On page 883 he says:

"In my opinion the decision of the Taxing Officer under R. 4 of Chapter XXXV is final by virtue of S. 5 of the Act."

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1. (1925) 29 C W N 879.

Swaminatha Aiyar v. Guruswami Mudaliar.

I can see no distinction whatever between this case and the case before the Calcutta High Court as Rankin, J., says on page 883:

"Probate duty being treated in the same manner as any other Court-fee, a suitor who satisfies the Taxing Officer satisfies the revenue—at least for the time being. It is not necessary to consider here whether his decision hampers the Collector in claiming more money under S. 19 (*h*). On the other hand, if the suitor does not satisfy the Taxing Officer he must either pay or persuade the Taxing Officer that the question is one of general importance so as to entitle the suitor to the decision of the Chief Justice or other Judge. The object of the Act is to secure payment prior to litigation and to afford as little scope as possible for litigation over the payment."

In *Balkaran Rai* v. *Gobind Nath Tiwari* (2) it was held that a decision under S.5 of the Act, that is the Court-Fees Act, 1870, is not open to appeal, revision or review and is final for all purposes and no means have been provided or suggested by the Legislature for questioning it. This Court, however, distinguished between a decision of the Taxing Officer as to the category under which a suit fell and the fee to be paid and held that a decision as to the category was not a question relating to valuation and therefore was not declared by the section to be final. In *Kunwar Karan Singh* v. *Gopal Rai* (3) it was held by Tudball, J., that the order of the Taxing Officer under S. 5 of the Court-Fees Act of 1870 was a final order and could not be reviewed. In *Ram Sekhar Prasad Singh* v. *Sheonandan Dubey* (4) it was held that under S. 5 of the Court-Fees Act of 1870 the decision of the Taxing Officer is final and even if he has done anything which the law does not allow him to do, the High Court has no jurisdiction to interfere with his decision as to the amount of the fee. Therefore in Calcutta, in Allahabad and in Patna it has been definitely decided that the Taxing Officer's order under S. 5 of the Court-Fees Act of 1870 is a final order and cannot be reviewed. This matter has moreover been dealt with in this High Court in *Mahomed Ishack Sahib* v. *Mahomed Moideen* (5) where it was held by the present Chief Justice, then Mr. Justice Coutts Trotter, that a dispute as to the fees payable to the clerks and officers of the Court within the meaning of S. 3 of the Court-Fees Act fell within S. 5 of that Act and the High Court can make rules for the imposition and collection of Court-fees in proceedings on the Original Side of the Court by virtue of the power to make regulations

2. (1890) I L R 12 A 129 (F B). 3. (1909) I L R 32 A 59.
4. (1922) I L R 2 Pat 198. 5. (1922) I L R 45 M 849 : 43 M L J 436.

for its procedure conferred by S. 15 of the Charter Act. With this decision and the other decisions already referred to. I am in entire agreement and I am clearly of the opinion that the Court has no power whatever to interfere with the decision of the Taxing Officer as his decision is final under S. 5 of the Court-Fees Act of 1870.

Although this objection of the learned Advocate-General disposes of this matter, nevertheless I have been asked to give a decision upon the other question. Mr. Veeraraghava Aiyar contends that as the relief claimed in this suit is incapable of valuation and no provision has been made in the High Court-Fees Rules, 1925, for the fee leviable in respect of such suits no stamp fee is leviable at all when such suits are filed on the Original Side of this High Court. Under the Court-Fees Amending Act, Madras, suits under S. 92 of the Code of Civil Procedure are provided for in Sch. II, Art. 17, sub-section 3 and a fee of Rs. 50 is levied. But the Court-fees leviable in the schedule as to both the Court-Fees Act of 1870 and the Amending Act have no application to suits on the Original Side of the High Court but only apply to the mofussal Courts. But Mr. Veeraraghava Aiyar argues that before the High Court-Fees Rules of 1925 were framed, the only Court-fee leviable in the High Court was a fixed fee and that of Rs. 30 irrespective of the value of the relief claimed or value of the subject-matter of the suit but that now instead of the fixed fee, an *ad valorem* fee is for the first time by those rules introduced and that as suits under S. 92, Civil Procedure Code, are incapable of valuation, no *ad valorem* scale of fees can rightly be applied to those suits. There is abundant authority for the proposition that the relief claimed in such suits is incapable of valuation. In *Thakuri* v. *Bramha Narain* (6) in the judgment of the Court it is stated:

"In our judgment the suit as framed embraced a claim for a declaratory decree to the effect that the property in suit was endowed property. For that portion of the claim the amount of Court-fee was Rs. 10. It also embraced a prayer for the appointment of the plaintiffs as trustees. In our opinion it was impossible to estimate at a money value that prayer in the plaint."

This was a suit under S. 539 of the Code of Civil Procedure but which is now S. 92. In *Girdhari Lal* v. *Ram Lal* (7) it was held that the mere fact that the plaintiffs in a suit under S. 539 of the Code of Civil Procedure may ask for an account to be taken from the trustees and that the trustees may be com-

6. (1896) I L R 19 A 63. 7. (1899) I L R 21 A 200.

pelled to refund moneys alleged to have been misappropriated by them does not take the case out of the purview of Art. 17, cl. (*vi*) of the second schedule of the Court-Fees Act, and render the plaintiffs liable to pay an *ad valorem* fee on that part of their plaint. Under Sch. II of the Court-Fees Act, 1870, Art. 17, sub-clause (*vi*) for every suit where it is not possible to estimate at a money value, the subject-matter in dispute and which is not otherwise provided for by that Act, a fee of Rs. 10 was leviable and the Court held that that was a suit within that Article. In *Kunhi Govindan Nambiar* v. *Krishnan Nambiar* (8) it was held that a suit for the removal of a karnavan of a Malabar tarwad on the ground of misfeasance is incapable of valuation and fell under cl. (*vi*), Art. 17, Sch. II of the Court-Fees Act of 1870. In *Ramrup Das* v. *Mohunt Shiyaram Das*(9) it was held that a plaint in a suit under S. 92 of the Code of Civil Procedure relating to public charities should bear a Court-fee of Rs. 10 only as required by Art. 17, cl. (*vi*) of Sch. II of the Court-Fees Act of 1870. In *Ramrup Das* v. *Mohunt Shiyaram Das* (9) it was held by the Calcutta High Court that a suit under S. 92 generally involves a question upon which no pecuniary value can be placed and therefore such a suit falls within the purview of Art. 17, cl. (*vi*), Sch. II to the Court-Fees Act and that the mere fact that the plaintiff asks for an account to be taken from the trustees does not take the case out of the purview of that Article. In *Rajagopala Naidu* v. *Ramasubramanya Aiyar* (10) it was held that a temple, which is devoted absolutely and in perpetuity to religious purposes even if it is to be regarded as a house, has no market value within the terms of S. 7, cl. (*v*) (*e*) of the Court-Fees Act and that hence a suit for the recovery of possession of it by a person claiming as trustee against another person also claiming as trustee falls under S. 11, Art. 17, cl. (*vi*) of the same Act. Therefore according to this decision the subject-matter of a suit under S. 92 is incapable of valuation. It is quite clear from these decisions to which I have referred that in most cases, if not in all cases, suits under S. 92 of the Code of Civil Procedure are incapable of valuation but what I have got to consider is whether suits which are incapable of valuation are within the scope of the High Court-Fees Rules, 1925. It is true that Appendix II does not in express terms deal with such suits and it is argued on behalf of the plain-

8. (1881) I L R 4 M 146. 9. (1910) 14 C W N 932.
10. (1923) I L R 46 M 782 : 45 M L J 274 (F B).

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tiffs that such suits have been excluded from the rules either intentionally or *per incuriam*. I do not myself see why it should have been intended that no Court-fee at all should be charged in respect of such suits. In the mofussal, a fee of Rs. 50 is charged in respect of them and previous to the High Court-Fees Rules of 1925 a fixed fee of Rs. 30 was charged and I cannot see any force in the contention before me that it was intended when these rules were framed that no fees at all should be charged in respect of these suits. Nor do I think that these suits were omitted *per incuriam*. The fees to be levied under the High Court-Fees Rules of 1925, Appendix II fall into two classes : those under Rs. 10,000 and those over Rs. 10,000. In respect of those of Rs. 10,000 and under, a fee of Rs. 150 must be paid and in respect of those over Rs. 10,000 there is a scale of Rs. 20 for every Rs. 5,000 in excess of Rs. 10,000 and in my view it was the deliberate intention of the framers of these rules that any suit of however small value or whether it had any value at all was to have charged in respect of it a minimum fee of Rs. 150. I do not myself see that the fact that the High Court has changed its practice from that of charging a fixed fee irrespective of value to that of charging an *ad valorem* fee can make any difference whatever. The High Court has chosen to adopt an *ad valorem* scale and fixed a minimum amount to be paid in respect of suits filed in the High Court, I do not see that there is anything ambiguous about this rule. I have been referred to cases where it has been laid down that the language of a taxing Act must be unambiguous and that the benefit of the doubt is the right of the subject and that the party has a right acting legally to evade payment of stamp duties and that the Crown must make out its right to its duty and if there is any means of evading stamp duty it is quite legitimate for the subject to do so. But, for the reasons I have given, I do not think that it can be said that the High Court-Fees Rules are ambiguous. I therefore hold that the Taxing Officer was right in rejecting the plaint as insufficiently stamped as in my view all suits irrespective of whether they have any value at all must have paid in respect of them the minimum fee of Rs. 150. In view of my finding that the order of the Taxing Officer was final, this latter decision was not necessary, but, as I was asked to decide the point, I have done so.

This application must therefore be dismissed with costs. But as the plaintiffs have since paid Rs. 150 in respect of the

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suit as Court-fees pending a decision upon this point the plaint has been received and the suit will proceed. Taxed costs. Certificate for counsel.

N. S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Vege Ramayya and another ... *Appellants* (Defendants)*

v.

Avatapalli Suryanarayanamurthi ... *Respondent (Plaintiff in both).*

Ramayya v. Suryanarayanamurthi.

Hindu Law—Minor—Guardian—Sale by—Necessity recited in deed—Sale for—Necessity recited found against—Inference of no necessity from fact of—Propriety.

In discussing the question whether or not there was necessity for a loan raised by the guardian of a minor, it would be relevant to consider with reference to the evidence whether the money was utilised for the purpose for which it was raised. And if the evidence shows it was not, the Court is perfectly justified in relying upon it for drawing the inference that there was no necessity justifying the transaction.

Second Appeals against the decrees of the Court of the Additional Subordinate Judge of Bezwada in A. S. Nos. 47 and 48 of 1923 preferred against the decrees of the Court of the District Munsif of Nuzvid at Bezwada in O. S. Nos. 129 and 130 of 1921 respectively.

Ch. Raghava Rao for appellants.

P. Satyanarayana Rao for respondent.

The Court delivered the following

JUDGMENT :—The suits in these two Second Appeals were instituted by the plaintiff to set aside the alienations of his property made by his father during his minority. The plaintiff, his two brothers and his father made a division of the family properties. The share that was allotted to the plaintiff was burdened with some debts. As the plaintiff was a minor at that time, his family affairs were looked after by his father as his guardian. To pay the debts due by the plaintiff, his father borrowed money from one Kanthamma under a mortgage, Ex. G-1, in 1906 and to pay off Kanthamma money was raised by executing sale deeds, Exs. C and D, of the plaintiff's property for a total consideration of Rs. 840. The defendants in the

*S. A. Nos. 930 and 931 of 1924. 12th April, 1927.

two suits who are the appellants in these Second Appeals represent the alienees.

The plaintiff's case is that these alienations are not binding on him. He contended that the debt due to Kanthamma under Ex. G-1 was discharged later on in 1915 by selling property under Ex. G and as such the money got under Exs. C and D could not have been utilised for the purpose for which it is said to have been taken. The defendants contended that the amount taken under the sale deeds was appropriated for the purpose of discharging the debt due to Kanthamma. The purposes recited in both the sale deeds are the same. They are to the effect that money was required to discharge the debt due to Kanthamma and also for the expenses of the plaintiff's sister's marriage.

The learned District Munsif found that the money raised by these deeds was appropriated for discharging the debts as mentioned in the documents and that the defendants made enquiries sufficient to convince them that there was necessity for the loan. The plaintiff's suits were therefore dismissed. In appeal the learned Subordinate Judge held that there is no evidence that any portion of the sum of Rs. 840 was utilised actually for either of the purposes mentioned in Exs. C and D. He also found on the evidence that no enquiries of any kind were made by the vendee before entering into the transactions. An argument was put before him that though the sum obtained was not utilised for paying Kanthamma's debt, it was utilised for the payment of other debts binding on the minor plaintiff This was also found against by the learned Subordinate Judge. I may say that this justification for the sale was not put before me in argument. On these findings the learned Subordinate Judge set aside the decrees of the District Munsif.

In second appeal, Mr. Raghava Rao for the appellants contends that it is not the duty of the *bona fide* creditor who lends money to the minor to prove that the money lent has been used for the purposes for which it was lent, that the Subordinate Judge's conclusions that the transactions are not binding is coloured by the view that it is the duty of the creditor to see to the application of the money and that he has set aside the decrees of the District Munsif because the defendants have not been able to show that the sum of Rs. 840 was actually utilised for the purposes mentioned in the sale deeds. He therefore argued that since the Subordinate Judge has not considered

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the real questions arising for decision the case should be sent down for a fresh consideration of the evidence under two headings: (1) Was there necessity for the sales, and (2) Were the sales such as a prudent manager would make in the circumstances of the case? The finding that the defendants did not make any enquiries at all is one of fact and I may say that that was not challenged before me. The correctness of the finding that the debt due to Kanthamma was not paid by the money raised by Exs. C and D but was actually discharged only later on under Ex. G was challenged by Mr. Raghava Rao, but it was admitted by him after going through the grounds of second appeal that the question has not been raised therein. Even if he had raised the question, the conclusion being one of fact, that finding also cannot be questioned in second appeal.

It is well settled that, in order to justify the alienation by a guardian of the minor's property there must be either "necessity" for the loan, or the creditor before lending money should have made reasonable enquiries to satisfy himself as to the existence of such necessity. In view of the findings, the question of *bona fide* enquiry does not now arise. In *Hanuman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree* (1) their Lordships of the Privy Council stated the responsibility of a creditor in circumstances like these in the following terms:

"Their Lordships think that the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire and acts honestly the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, *and they do not think that, under such circumstances, he is bound to see to the application of the money*. .... Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution but is himself deceived."

Relying on the passage which I have underlined (italicised) in the above extract it is argued that the learned Subordinate Judge has allowed the plaintiff's suits because he thinks that it is the duty of the creditors to see to the actual application of the money and that such duty has not, in his opinion, been discharged by the creditors (vendees) in this case. I do not think that this argument can be supported. No doubt, when a creditor seeks to justify on the ground that he made

1. (1856) 6 M I A 393.

enquiries and was reasonably satisfied that there was necessity, he is not bound further to prove that the money borrowed was actually utilised for the purposes for which it was borrowed. But that is not the case here. The learned Subordinate Judge nowhere says that it is the duty of the creditor to see to the application of the amounts borrowed. The justification for the loan based upon proper enquiry being out of the question, the ground of justification to be considered is "necessity". Whether there was necessity or not for a loan or sale would depend upon the circumstances of the case. In discussing such a question I think it would be relevant to consider with reference to the evidence whether the money was utilised for the purposes for which it was raised. If it was not, then at the time it was raised there could obviously have been no necessity for it. If the evidence shows that the debt for which the money was raised was paid by other means and some time after, then the learned Subordinate Judge is perfectly justified in relying upon it for drawing the inference that there was no necessity justifying the transaction and that is what has been done by the learned Subordinate Judge in this case. In paragraph 8 of his judgment he deals with the question of necessity absolutely apart from the question of "*bona fide* enquiry". Having found in that paragraph that the debt was discharged not by the father but by the minor afterwards by other means, he finds in paragraph 9 that the defendant made no *bona fide* enquiries regarding necessity for the sale. The appellants' argument seems to be based upon a confusion. The finding given with regard to necessity as justifying alienation is used by him as if it was given in connection with the question whether the vendees made *bona fide* enquiries before entering into the transactions. I do not think that there would have been any scope for the plausible and ingenious argument put forward on behalf of the appellants if the learned Subordinate Judge has ended para. 8 with a sentence like this:

"I therefore find that no 'necessity' has been proved in this case for the sale."

As I am satisfied that the learned Subordinate Judge has found that there was no necessity to justify the alienation and that the vendees did not make *bona fide* enquiries before entering into the transactions, I think the Lower Court's decree cannot be questioned. Recitals in deeds of sale with regard to the existence of legal necessity for an alienation are not of themselves evidence of such necessity without substantiation by

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evidence *aliunde* [see *Brij Lal* v. *Inda Kunwar* (2)]. Except the bare mention of the purposes in the deeds, there is no other proof in this case of necessity, to justify the suit alienations In the view that I take of this case as one concluded by the findings given by the Lower Court, it is not necessary to refer to and discuss the cases cited by either side in support of their respective contentions.

It has not been argued before me or in the Courts below that the alienations were for the benefit of the minor as distinguished from the other grounds justifying the alienations.

I dismiss these two Second Appeals with costs.

A. S. V. *Appeals dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—VISCOUNT DUNEDIN, LORD SHAW, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Mukund Dharman Bhoir and others ... *Appellants** (*Defts.*)

v.

Balkrishna Padmanji and others ... *Respondents* (*Plaintiffs*).

P. C. — Mukund Dharman Bhoir v. Balkrishna Padmanji.

Hindu Law—Partition—Separation of status—"Division" of joint estate

A member of a joint Hindu family has an indefeasible right to demand partition.†

The question being whether, by reason of a certain document, styled a "release", executed by a Hindu father (a member of a joint family), the executant and his sons were separated in status from the joint family and whether there was at that time a partition of the joint family estate, the Judicial Committee laid down the following tests:—"There is a two-fold application of the word 'division' in connection with a partition. *In the first place,* there is separation, which means the severance of the status of jointness. That is a matter of individual volition; and it must be shown that an intention to become divided has been clearly and unequivocally

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2. (1913) I L R 36 A 187 . 26 M L J 442 (P C)

*P C Appeal No. 117 of 1925. 18th July, 1927.

†*Reporter's Note*:—The rule laid down by the majority of the Full Bench in *Apaji* v. *Ramchandra,* (1891) I L R 16 Bom. 29 that a son cannot, in the lifetime of his father, sue his father *and uncle* for partition of ancestral immoveable property, against the will of the father, apparently remains unaffected by the above pronouncement of the Judicial Committee. It may be remarked that in the case before their Lordships, defendant No. 5 (Padman), father of the plaintiff, though alive at the date of the suit, died during the pendency of the suit in the Trial Court (as to which, see *Chudasama* v. *Partapsang,* (1903) I L R 28 Bom. 209 at p. 213)—K. J. R.

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expressed, it may be by explicit declaration or by conduct *Secondly*, there is the partition or division of the joint estate, comprising the allotment of shares, which may be effected by different methods". Their Lordships held, on the construction of the document, that it did not operate either as a separation of status or as a partition of joint family property.

Appeal (No. 117 of 1925) from a judgment and decree of the High Court, Bombay (Pratt and Marten, JJ.), dated the 4th October, 1922, varying a judgment of the Subordinate Judge of Thana, dated the 21st December, 1920.

The material facts are set out in their Lordships' judgment. The release of 1907 executed by Padman, the construction whereof was the principal question argued before the Judicial Committee, was as follows:—

"To MUKUND DHARMAN BHOIR,

I, Padman Dharman Bhoir, pass a deed of release in writing to the following effect: You are my elder brother and I have been living separate from you for about the last 15 years. Our father Dharman and you were living together; and you have been making *Vahiyat* (looking to the management) of all the property. When I became separate our father gave me property as mentioned below, and which is in my possession and enjoyment..... I have been maintaining my family on the income of the said property. The whole of the property belonging to our father Dharman has been acquired by him. I have not helped him in any way in acquiring the same. The said Dharman has made and left a Will and the whole of the property has been given to you under that Will and therefore in virtue of the same you have become full owner of that property after his death. Our father has not taken any writing from me regarding the above-mentioned property which he gave me at the time when I became separate. However as our father is dead and as I do not desire to have any more property than what is given to me by our father,you taking into consideration my poor circumstances have given me the below-mentioned additional property. The particulars thereof are as follows:—...... You having given me the property as detailed above have given the same into my possession.

I or my heirs, etc., have left no right, title or interest whatsoever in the moveable or immoveable property acquired by you yourself or by our father or that which you may acquire hereafter except this (the above-mentioned property); you are the full owner of all that property, and it is agreed to. You may enjoy the same from generation to generation. I will not raise my objection against you by putting forth my right of ownership in any way to the said property. So also I will not contest (the contents or genuineness) of the Will made by our father I am not responsible for your and our father's debts. So also if I have got any debts you or your estate is not liable for the same. The liability regarding the same rests on me or my above-mentioned property. I have also no claim whatsoever over the outstandings that may be due to you or our father. The moveable property, namely pots and pans, clothes or ornaments, etc., which our father gave me when he was alive is all in my possession. I have left no claim whatsoever over any other moveable property except this and I will

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not complain about the same. If I may have any claim over any property moveable or immoveable belonging to you or inherited by you from our father except the said above-mentioned property it may be considered that I have given up the same by virtue of this writing with my free will and pleasure. I have duly given this deed of release in writing with my free will and pleasure. Dated the 8th February, 1907."

The parties to the suit were governed by the Bombay School of the Mitakshara Law.

De Gruyther, K. C., Parikh and *Jamnadas M. Mehta* for appellants.

Lowndes, K. C., and *Raikes* for respondents.

18th July, 1927. The Judgment of their Lordships was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal by Mukund Dharman Bhoir, Govind M. Bhoir, Ramchandra M. Bhoir and Harishchandra M. Bhoir, who were defendants 1 to 4 in the suit, against a judgment and decree of the High Court of Bombay dated the 4th October, 1922.

The suit was brought by Balkrishna against the above-mentioned first four defendants, Padman, defendant number 5, who was the plaintiff's father, Malji, defendant number 6, the plaintiff's brother, Sowari, defendant number 7, the sister of Padman, and other defendants, whom it is not necessary to mention in detail. Krishnaji Ramchandra Lele and Jagunnath Raghunath Shet were added as defendants subsequently.

Krishnaji had purchased from the plaintiffs, after the institution of the suit, a 20-pie share of the plaintiff's share in the property which was the subject-matter of the suit. Jagunnath had purchased from Padman and Malji a 40-pie share of their share in the property.

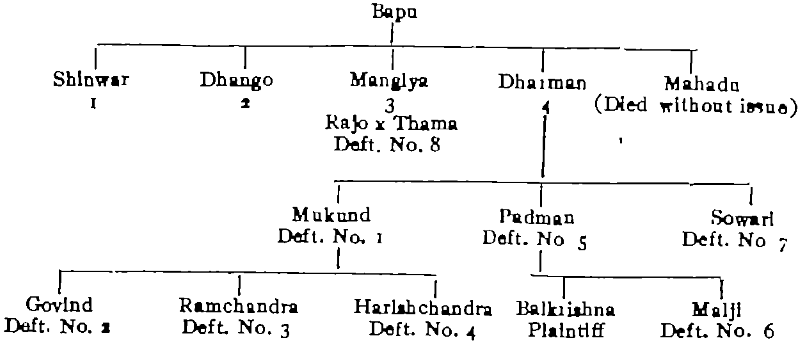
These two defendants, Krishnaji and Jagunnath, are the only respondents who have appeared on the hearing of this appeal.

The learned counsel Sir G. Lowndes, who appeared for them, stated that in view of the fact that the only question argued before the Board was as to the amount of the shares of the plaintiff and his brother Malji, and having regard to the nature of the argument which was presented by the learned counsel for the appellants, his clients' interests were fully protected, whichever way the appeal was decided.

Sir G. Lowndes, however, intimated that he had prepared an argument upon the merits of the appeal, and was prepared to present it to the Board as *amicus curiae* if their Lordships so

desired. Accordingly, the learned counsel was heard on the merits.

The pedigree set out in the plaint shows the relationship of some of the parties hereinbefore mentioned, and is as follows:—



Padman, the defendant number 5 and father of the plaintiff, was alive when the suit was instituted; he died during the pendency of the suit and before the learned Subordinate Judge delivered his judgment.

The suit was brought by the plaintiff for partition of the property described in Schedules A, B and C of the plaint.

The properties were alleged to be the joint properties of a joint Hindu family which had been formed by Dharman and his two sons, Mukund and Padman, and which was governed by the Bombay School of the Mitakshara Law.

The property contained in Schedule C was alleged by the defendant Sowari to have been given to her. The suit was dismissed so far as the property described in Schedule C was concerned. The High Court on appeal affirmed such dismissal, and no point in respect thereof was raised on the hearing of this appeal.

The appeal thereof is confined to the property described in Schedules A and B.

The property in Schedule A is that which the plaintiff alleged was in the possession of Mukund, defendant number 1, and the property described in Schedule B was alleged to have been in possession of Padman, defendant number 5, the plaintiff's father.

The defence of the appellants was threefold. In the first place, it was alleged that the property was not subject to partition, because there had been a prior partition in 1891 between Dharman and Mukund on the one hand, and Padman on the

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other. Secondly, it was urged that the property was not subject to partition because it was self-acquired property of Dharman and Mukund, the first defendant. Thirdly, it was urged that Padman and his two sons separated in interest by a document, which was called a release, and which was executed by Padman in the year 1907.

No question arises before their Lordships as to the first and second of the above-mentioned defences.

The learned Subordinate Judge found that there was no partition in 1891, and that the property was not the self-acquired estate of Dharman and the first defendant (Mukund), but that it was the joint family property of them and Padman and their sons.

These two findings were affirmed by the High Court on appeal, and the case was argued on behalf of the appellants before their Lordships on the assumption that these findings must be accepted.

The only question, therefore, which their Lordships have to consider and decide is the third, which relates to the document executed by Padman in 1907.

The facts, material to this point, are as follows:—

Padman apparently was an idle and vicious young man, of weak intellect; he was looked upon as a burden to his family and was regarded as incapable of assisting in the management of the family estate. Accordingly, a part of the family estate was allotted to him as a provision for his maintenance, and he had to live separately from his father and brother.

It is, however, found as a fact that Padman did not know that his father and Mukund had any property which was ancestral, and in which he had an interest. He was not admitted into the confidence of either of them, and he did not know that the property which was alloted to him was part of the joint family estate.

It appears that the father Dharman made a will in 1904. It has been found by the learned Subordinate Judge that the will was void in so far as it related to the ancestral property of the joint family, and did not affect the rights of the plaintiff or his brother Malji.

In 1907, the document, to which reference has already been made, was executed by Padman. It is not necessary to set it out in detail, as its terms have been so fully discussed in the judgments of the Courts in India.

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It has been called a release.

It is really more in the nature of a series of recitals or admissions that the whole of the property was the separately acquired property of his father Dharman, that Dharman had made a will, that by virtue of the same, Mukund (defendant number 1) had become full owner of the property after his father's death; that Dharman had given Padman certain property during his lifetime, and that he had been living separately from his father and Mukund; that Mukund had given him certain additional property in consequence of his poverty; and, finally, the document stated that Padman and his heir had no interest in the moveable and immoveable property acquired by Mukund or his father, and that Mukund was the full owner of all the property except that which had been given to Padman.

The learned Subordinate Judge held that the document was executed by Padman under the conviction that all the estate was the self-acquisition of Dharman and Mukund, that he, Padman, had no interest in it by birth, and that he could not make any claim to the property, as it had been disposed of by his father's will.

He held that it was binding on Padman, who thereby released his one-sixth share in favour of Mukund, but it was not binding on his sons, viz., plaintiff and his brother Malji. He decided that the plaintiff and his brother Malji were each entitled to one-sixth of the family estate.

Both the plaintiff and the defendants 1 to 4 appealed to the High Court.

Mr. Justice Pratt held that the document of 1907 did not proceed on the footing of benefit at all, but on the basis of an eleemosynary allowance to a man who was entitled to nothing, and that the plaintiff and his brother Malji did not lose their interests in the joint family property by reason of the so-called release.

Mr. Justice Marten did not decide that the so-called release was binding on Padman, but for the purpose of his judgment the learned Judge was prepared to assume that it was so binding. The learned Judges held that the whole of the property, including that in the possession of Padman, should be thrown into hotchpot and then divided between the surviving members (according to their respective shares), and that the release could not be treated as if one-sixth was taken out and had become the separate share of Mukund

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and as if the other members were entitled to divide the balance only.

The result was that the High Court decreed that the defendants 1 to 4 should take one-half of the estate and that the plaintiff, his brother Malji and the alienees (viz., defendants Krishnaji and Jagunnath) should take the other half according to the shares mentioned in the judgment.

It is clear that the whole of the property mentioned in Schedules A and B must be treated as joint property of the family of which Padman and his sons were members.

Although Padman, in consequence of his habits and his incapacity, had to live separately, and although certain property was allotted to him for his maintenance, it has been found as a fact that such property was much less than what his one-third share would have been, and that there never was, in fact, any partition of the joint property before 1907.

In their Lordships' opinion the sole question is whether, by reason of the deed of 1907, Padman and his two sons were separated in status from the joint family and whether there was at that time a partition of the joint family estate.

There is a twofold application of the word "division' in connection with a partition.

In the first place, there is separation, which means the severance of the status of jointness. That is a matter of individual volition ; and it must be shown that an intention to become divided has been clearly and unequivocally expressed, it may be by explicit declaration or by conduct.

Secondly, there is the partition or division of the joint estate, comprising the allotment of shares, which may be effected by different methods.

In their Lordships' opinion the deed of 1907 does not operate either as a separation of status or as a partition of joint family property.

The deed proceeded upon the basis that there was no joint family and no joint family property. The basis was that all the property, including that which was in Padman's possession, had been separately acquired, and that all the property except that in possession of Padman belonged to Mukund.

Further, by the deed, Padman agreed not to contest the genuineness or the contents of his father's will in consideration of the gift of certain property by Mukund.

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There is no suggestion in any part of the deed that the parties were proceeding upon the basis that there was a joint family of which they were members, or that they were taking part in a division of the joint family property.

In their Lordships' opinion this disposes of the appeal, for it has now been ascertained that the property in dispute was, in fact, joint family property, that there never was a separation or division of the joint family property, and the plaintiff being a member of the joint family has an indefeasible right to demand partition.

Their Lordships are of opinion that the High Court's direction as to the division of the estate proceeded on a correct basis, and that the decree of the High Court in accordance therewith was rightly made.

They will therefore humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Ranken, Ford & Chester.*

K. J. R. *Appeal dismissed.*

[The Reporter is indebted to the respondents' solicitors, Messrs. Ranken, Ford & Chester, for the information as to the proceedings in the Indian Courts.—K.J.R.]

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT :—LORD ATKINSON, LORD CARSON, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Laxmanrao Madhavrao Jahagirdar ... *Appellant** (*Plaintiff*)

v.

Shriniwas Lingo Nadgir and others ... *Respondents* (*Defts.*).

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Bombay Revenue Jurisdiction Act (*X of* 1876), *S.* 4—*Jurisdiction of Civil Courts—Suit for declaration that plaintiffs were watandar patils and kulkarnis of a village—Cancellation of Watan Register—Contribution levied under Bombay Hereditary Offices Act*(*III of* 1874)—*Suit to set aside Collector's order barred by limitation—Claim for refund of contribution not likewise barred, when order illegal.*

Under S. 4 of the Bombay Revenue Jurisdiction Act (X of 1876), a Civil Court has no jurisdiction to entertain a suit for a declaration that the plaintiffs were watandar patils and kulkarnis of the village, and for cancellation of the Watan Register. The words of the section in question are wide enough to preclude the Civil Courts from entertaining any claim to the watan offices in opposition to the claim of the hereditary officers

*P C Appeal No. 149 of 1924. 28th June, 1927.

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appointed or recognised under the Bombay Hereditary Offices Act (III of 1874) and also any claim for the cancellation of the Watan Register.

Contribution under the Bombay Hereditary Offices Act (III of 1874) having been levied from the plaintiffs for the emoluments payable to the representative Watandars, the plaintiffs sued (*inter alia*) for a refund of the amount on the ground that they were entitled to hold the suit lands free of assessment, and that they had ceased to be watan lands, and were not liable to contribution for the remuneration of officiators under the Act. The High Court held that as the suit was brought more than six years after the Collector's order, it was barred by Art. 120 of the Indian Limitation Act, 1908, and as the order could no longer be impugned, the plaintiffs were barred by limitation from suing for a return of the contribution levied on them in consequence of that order, and for a declaration that the suit lands in their possession were not liable to contribution under the Bombay Hereditary Offices Act (III of 1874).

Held, by the Judicial Committee (reversing the High Court) that the plaintiffs' failure to file a suit to set aside the Collector's order imposing the contribution within the period limited for filing such a suit did not preclude them from suing for a refund of the contribution. "If the order was illegal, the plaintiffs were not bound to file a suit to set it aside, but were entitled to wait until it was enforced against them, and the attempt to enforce it against them gave them a good cause of action which was admittedly within time".

Their Lordships also held that the jurisdiction of the Civil Courts to entertain the claim for a refund of the contribution levied under the Bombay Hereditary Offices Act (III of 1874) was not barred by S. 4 of the Bombay Revenue Jurisdiction Act (X of 1876).

Appeal (No. 149 of 1924) from a judgment and decree of the High Court, Bombay (Sir Norman MacLeod, Chief Justice and Mr. Justice Shah), dated the 16th September, 1921, reversing a decree of the District Judge of Dharwar

The material facts are set out in the judgment of the Judicial Committee and also in the report of the case in the Court below (*see* 24 Bom. L. R. 214).

Lowndes, K. C. and *M. R. Jardine* for appellant.

Dunne, K. C. and *E. B. Raikes* for respondents (the Junior Nadgirs).

28th June, 1927. The Judgment of their Lordships was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—This is an appeal from a judgment and decree of the High Court of Bombay reversing the decree of the District Judge of Dharwar and dismissing the suit brought by the plaintiff Laxmanrao, jahagirdar of Hebli, for declarations (1) that the plaintiff and defendants 12 and 13 are, and that the Nadgirs are not, watandar patils and kulkarnis of Hebli village, (2) that the lands measuring 120 mars entered in the Watan Register of the village prepared under Bombay

Act III of 1874 are not watan lands, (3) for a cancellation of the Register, (4) for a declaration that these lands were not liable for the remuneration of patils and kulkarnis, and (5) for the recovery of Rs. 969-0-8 levied from the plaintiff under Bombay Act III of 1874.

The plaint alleged that the grant to their ancestors in 1748 of the village included 200 mars of land assigned for the remuneration of the patil kulkarni and nadgir offices in the village, and also the offices themselves, that as the defendants' ancestors who were the previous owners of these watans had failed to pay the judi and raised a rebellion, their watans had been resumed long before 1723, and so the watani nature of the lands came to an end; that ever since the establishment of the British Government the plaintiff's family had been in possession of all the said 200 mars, except 7¼ mars and 3 bighas and except 22 mars of which they had been deprived in a civil suit filed by defendants 7 to 11 in 1867, and also had been in possession of all patilki and kulkarniki rights. They alleged that they were watandars of patilki and kulkarniki under the sanad of 1748, and, if not, were entitled to their offices by virtue of long possession. The proceedings of Government recognising the family of defendants 2 to 11 as watandars, and framing the Watan Register accordingly, and imposing a contribution on the plaintiff under Act III of 1874 were accordingly wrongful.

In paragraph 15 it was pleaded that the 200 mars were not now watan land,

"the reason being that in the year 1858 the Inam Commissioner decided that the whole of the village of Hebli, including the land measuring 200 mars, is not watan, but that it is another kind of estate, and on date the 6th March, 1863, Government passed final orders to that effect in resolution bearing number 676. Although Jahagirdars and Nadgirs (meaning the family of defendants 2 to 11) were (the only) parties to that matter (*i. e.*, inquiry) (still) the Government, Jahagirdars and Nadgirs are bound by this decision and the decision passed by the Settlement Officer in the year 1864 that only 7¼ mars and 3 bighas of land is liable to settlement."

The cause of action, it was alleged, arose on the 7th October, 1908 when Government passed Resolution 10129 deciding that the Nadgirs were watandars depriving the plaintiff and defendants 12 and 13 of their rights, and making the lands in possession of the plaintiff's family liable for the remuneration of the patil and kulkarni although they were not watani lands.

The first defendant, the Secretary of State in Council, filed a separate written statement pleading that the suit was

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barred by Bombay Act X of 1876, S. 4 (*a*), Bombay Act III of 1874, S. 25, and Arts. 14, 120 and 124 of the Limitation Act. He also pleaded that the family of defendants 2 to 11 were the real watan patils, kulkarnis and nadgirs, and that the 200 mars of land were kadim inam, of which 120 were assigned for patilki and kulkarniki, and the rest for the nadgir office. They had been in the possession of the jahagirdars, under kamavishi or temporary arrangement, because the watandars were unable to pay judi, and not because the jahagirdars were patils, kulkarnis or nadgirs. The jahagirdars had admitted this and were estopped from questioning it. Further the orders passed by Government were legal and proper. The allegations in paragraph 15 of the plaint were not admitted, and the plaintiff was put to strict proof of them.

As regards the Nadgirs, defendants 2 to 11, the principal written statement was filed by defendant 4. Defendants 2 and 3 and 5 to 11 filed written statements to the same effect, defendants 5 to 11 contending further that the suit was bad for misjoinder of defendants 5, 6 and 7. Defendant 12 was *ex parte* and defendant 13 filed a written statement supporting the plaintiff.

The contentions of the parties sufficiently appear from the principal issues settled in the case, which were as follows:—

(1) Is the jurisdiction of the Civil Court barred by S. 4A of Bombay Act X of 1876?

(2) Is it barred by S. 25 of Bombay Act III of 1874?

(3) Is it barred by the Pensions Act XXIII of 1871?

(4) Is it in time?

(10) Are the decisions of the Inam Commissioner and Settlement Officer under Act XI of 1852 binding on the parties?

(13) Is the land in suit (120 mars) watan property?

(14) Have plaintiff and defendants 12 and 13 acquired by adverse possession a title to the offices of watandar patil and kulkarni, and to the watan land?

The District Judge found for the plaintiff on all the issues except that he held that the claim for the cancellation of the Watan Register was barred under S. 4 (*a*) of the Bombay Revenue Jurisdiction Act, 1876. The High Court allowed the appeal and dismissed the suit on grounds which will be considered later.

The history of this litigation is long and complicated, but the facts which are material for the decision of the case may be stated as follows:—

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In the village of Hebli there were in former times the usual service watans, or hereditary offices of patil or headman, kulkarni or accountant, and nadgir, which were vested in the family of defendants 2 to 11, who held the watan lands of 200 mars in the village, subject to the payment to Government of a fixed judi instead of the full assessment, the revenue thus remitted being remuneration for the discharge of their duties. It would appear further from records of the early part of the eighteenth century that this judi fell into arrears, and that the ruling power entered into possession of the watan lands and treated them as kamavishi, or under management, for the purpose of realising the arrears. This was apparently the state of things when in 1748 the ruling power granted the village to the plaintiff's predecessor in jaghir. The sanad conferred upon him

"the kasba of Havur Hebli, together with the hamlet Vatanhal and lands appertaining to zabt (*i. e.*, attached) inams of muccadum and nadgirs and others."

The effect of these words is in dispute, but it may be observed that Mountstuart Elphinstone, in his well-known report on the territories conquered from the Peishwa (1821), includes among the sources of revenue of the former Government (p. 31, 2nd edition), a heading "Wuttun Zubtee—Produce of Lands belonging to Zemindars sequestrated by Government," and the reports of his subordinates, on which his report was founded, show the extreme reluctance of the rulers in ancient times to forfeit absolutely watan and mirasi lands for the non-payment of revenue, and that even where the owners deserted their lands and fresh cultivators had been admitted, the descendants of the former owners were not wholly barred of their right to reclaim them until the lapse of 100 years. These facts tend to support the construction placed by the Bombay High Court in a suit which will be referred to on the words of the sanad, which they held did not amount to a fresh grant of the watan to the plaintiff's ancestor after confiscation from the Nadgirs, because the word "zabt" was capable of meaning "under attachment". It is, however, unnecessary to pursue this point. The District Judge refused to act on the defendants' evidence tending to show that they were in possession in certain years subsequent to the grant of the sanad to the plaintiff's ancestor; and it appears clearly from the accounts produced for the plaintiff, that, ever since the annexation of the Peishwa's territories and the introduction of British rule, these lands continued in possession of the plaintiff's family, and were entered in

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the accounts under the heading of kamavishi, or under management, though the defendants' family made unsuccessful efforts to recover them.

This was the state of things when the Inam Commission was set up under Act XI of 1852 for the adjudication of titles to lands claimed to be wholly or partially rent free in the Presidency of Bombay.

After reciting that claims against Government in respect of inams and other estates, wholly or partially exempt from payment of land revenue, were excepted from the cognizance of the ordinary civil courts (which, it may be observed, had sole competence as to titles to the land itself), and that it was desirable that the said claims should be tried and determined without further delay, the Act proceeded to set up the Inam Commission for that purpose. Schedule A of the Act contained rules prescribing the duties of each Commissioner and his assistants, and Schedule B "Rules for the adjudication of titles to estates claimed as inam or exempt from the payment of land revenue." Speaking generally, in cases coming under Rules 1 to 5, the exemption was to be confirmed and to become final, while R. 6 provided that in other cases the lands were to be resumed. Rule 7 then provided for the continuance of holdings for the support of mosques and temples, and R. 8 for the continuance of holdings by official tenure meant to be hereditary. This rule would undoubtedly have included the watan offices of patil and kulkarni but for the fifth proviso which was as follows :—

"The provisions of this rule are not in any way to apply to emoluments continued for service performed to the State, as the service watans of desais . . . patils, kulkarnis . . . whose claims are to be disposed of according to the rules which are or may be established for the regulation of such holdings."

Under this Act the question, whether the jahagirdar's grant was a serva inam—that is to say, a permanent revenue-free grant, or was held on saranjam tenure—came before the Inam Commissioner, who, on the 31st July, 1858, recorded his decision (Ex. 312) that the claimant's title to hold the villages in serva inam was invalid, but that its enjoyment was not to be interfered with in consequence of this decision. This was in accordance with Rule 10 of Schedule B of the Act, which provided that the rules were not to be necessarily applicable, among other tenures, to saranjams, the titles and continuance of which were to be determined as theretofore under such rules as Government might issue.

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With reference to watan inams in the village, Ex. 451, of the 9th February, 1863, which is a communication from the Jahagirdar to the Mamlatdar or local revenue officer, shows that Major Etheridge, apparently, as Inam Commissioner, had taken up the general question of the kadim inams in this village, that is to say, of the inams which existed before the grant to the plaintiff's family, and not being included in that grant, were liable to be dealt with under the Act.

Major Etheridge's proceedings on this question are unfortunately not forthcoming, but in Ex. 471 of the 12th November, 1864, which was a reply to a reference from the Revenue Commissioner, he states that in 1862 he had settled certain items, on the best evidence available, to be kadim. In their Lordships' opinion, the inference is that in so deciding he was acting as Inam Commissioner, and that the reference related to that decision. In his reply, Ex. 471, he deals with 21 items, all of which he had settled (apparently as Inam Commissioner) to be kadim or old inams. Of these, he found on the fresh evidence which was available that only two items, with which we are not now concerned, one being the gramjoshi's or village astrologer's inam, were kadim, that is in existence prior to the grant to the jahagirdars. He went on to observe, however, that the jahagirdars had not received items 15, 16 and 17 (the 200 mars to which the suit relates) as *bona fide* khalsat but as "coomavisee" (*i. e.*, kamavishi), In explanation of these terms, reference may be made to the following passage in Sir Charles Sargent's judgment in R. A. No. 3 of 1876, the suit already referred to, with reference to other items of this watan land which are not now in suit:

"Now there can be no dispute about the term 'khalsat,' which means when applied to (? unalienated) lands 'those of which the revenue remains the property of Government not being made over in jagheer or inam to any other parties (Wilson's Glossary of Indian Terms.)' When used in regard to a jagheer village, it means land which is absolutely the property of the jagheerdar not being made over in inam to any other parties."

With reference to the term "kamavishi," the learned Judge observed:

"It seems very clear that land entered as kamavishi is land which for some reason or other has come under the management of the Government or its assignee for the purpose of collecting the revenue but which has not been incorporated with the khalsat land, which is the absolute property of the Government or its assignee."

Major Etheridge's reply went on to state that it appeared from certain records of 1796 that the kamavishi management

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remained as before, and that, as there was nothing to show that it had been subsequently altered, with the exception of 7¼ mars and 3 bighas which at some time had reverted to the Nadgir (the defendant's family), it might be allowed that the kamavishi management of the remaining 192½ mars 6 bighas had assumed a permanency of tenure which could not justly be interfered with. He accordingly recommended that the Nadgirs' land of 7¼ mars and 3 bighas, with one other item with which we are not concerned, should alone be made amenable to settlement as held from Government when the order for the settlement of alienated villages should be authorised. The remainder, he considered, should belong to the Heblikars or Jahagirdars.

What was done on this recommendation appears from Ex. 477, an entry in the revenue outward register of the Dharwar Talequa for 1864-5 containing a precis of a communication sent to the Mamlatdar or subordinate revenue officer of Dharwar. This recites the recommendation of Major Etheridge that only 7¼ mars and 3 bighas should be treated as liable to settlement and that all the remaining lands except those lands should be continued with the Heblikars. The entry goes on

"and His Honour the Revenue Commissioner has approved of this in his letter No. 5056 dated the 30th of the month of December. 1864 A. D. Therefore the order has been sent to you for (Daklala) reference in order to give effect to this and the Heblikars have also been informed."

It was admitted by Government in answer to interrogatories that Major Etheridge's recommendation to which effect was thus given, was approved by Government, and in their Lordships' opinion the inference is that it was approved by them on appeal from Major Etheridge's original decision as Inam Commissioner Under Schedule A, R. 2, the Governor in Council was authorised to modify, reverse or annul the decision of the Inam Commissioner, and under Schedule B, Rule 11, to relax the rules in favour of claimants and to interpret the precise meaning of any of the rules as to which a question might arise. Their Lordships, therefore, see no sufficient reason for differing from the District Judge's finding that the decision that the suit lands, with the exception of the 7 mars, were not to be treated as kadim, and so amenable to settlement, must be taken to have been made in the exercise of the powers conferred by the Act, a finding which is not questioned in the reversing judgment of the learned Chief Justice, who proceeded on the view that such a decision having regard to proviso 5 to R. 8 was without jurisdiction. In their Lordships' opinion,

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however, it was within the jurisdiction of the Government as the supreme authority under the Act to decide whether these lands should be dealt with in the one way or the other.

Before considering the effects of this decision it is necessary to complete the narrative of the events which led up to the filing of the present suit.

There were partitions in both families, and in 1867 some members of the defendants' family instituted a suit against some of the plaintiff's family, to which the plaintiff was not a party so that the decision is not binding on him as *res judicata,* to establish their right to the patil and kulkarni offices, and in particular to recover certain items of watan lands which were in possession of the members of the plaintiff's family who were defendants in that suit.

The High Court in R. A. No. 3 of 1876 held that up to a period within twelve years of the institution of the suit the possession of the defendants (the jahagirdars) was not adverse to the plaintiff (the Nadgir), and that the latter was entitled to recover the lands in suit on payment of such arrears of judi as might be found due on taking an account. It was found that no arrears of judi were due and he accordingly recovered possession.

The other Nadgirs, represented by defendants 2, 3 and 5 to 11 in the present suit, did not then institute any suit to recover from the family of the present plaintiff and defendants 12 and 13 the watan lands in their possession.

In 1873 the Bombay Hereditary Offices Act III of 1874 was enacted to declare and amend the law relating to hereditary offices; and in 1884 the District Deputy Collector of Dharwar passed an order Ex. 295 on an application by members of the Nadgirs' family, which appears to have been made in 1875, under Part VI of that Act for the preparation of the patilki and kulkarniki watans of the village of Hebli. He held that neither the plaintiffs' nor the defendants' families had established their claims and that the appointment should be treated as amani or stipendiary. This decision was afterwards reversed by the Bombay Government, who directed a fresh enquiry, Ex. 324, of 22nd November, 1890.

The Collector in 1893 reported, Ex. 323, that he was not competent to decide whether the Nadgirs or the Jahagirdars were watandars and referred the parties to a civil suit. Suits

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were filed on both sides but not prosecuted; and in 1904 the Commissioner, Ex. 321, directed the Collector to submit his opinion as to which of the two families was entitled to the watan (including lands and rights of service). If it should be found that neither side had any valid claim, the Collector was to report what the watan lands were, and whether they should revert to Government, and if they were sufficient to maintain stipendiary village officers.

The Deputy Collector, to whom the matter was referred, was of opinion that the judgment of the High Court, already referred to, conclusively showed that the Nadgirs were the watandars, and the Collector of Dharwar prepared the patilki and kulkarniki watan register of the village on this basis, Ex. 316 of 28th November, 1906, deciding, pursuant to the provisions of the Act, which members of the Nadgirs' family were to be representative watandars. The Jahagirdars appealed and the Commissioner of the Southern Division passed orders on the appeal, Ex. 315, of 17th July, 1907.

He held that S. 25 of the Act made it imperative for the Collector to determine who were to be representative watandars, and register their names without waiting indefinitely until one or other of the rival claimants to the office of watandars procured a decision of the Civil Court, and that the Nadgirs were shown to be the watandars as decided by the High Court in the suit already referred to, and that the representative watandars had been rightly selected from their family.

He consequently upheld the Collector's decision in determining members of the Nadgir family to be representative watandars. He was further of opinion that the whole of the watan lands should be entered as such in the Watan Register, 80 mars for the patilki watan and 40 for the kulkarniki as shown in Major Etheridge's letter of 9th January, 1865, but that it would not be necessary to recover for the watan from the jahagirdars in possession more than was required for the endowment of the officiators under the Act.

This order was confirmed by Government Resolution 10129 of 1908, and in 1913 the sum of Rs. 969-0-8, which it is now sought to recover, was levied under the Act from the appellant for the emoluments payable to the representative watandars. Thereupon the plaintiff filed the present suit.

On the merits the District Judge was of opinion that the decision of the Governor in Council confirming the recommenda-

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tion of Major Etheridge was binding on the parties and entitled the plaintiff to hold the suit lands free of assessment, and that they had ceased to be watan lands, and were not liable to contribution for the remuneration of officiators under the Act.

He held further that the plaintiff's family had acquired the offices of watandar patils and kulkarnis by adverse possession. but that under Section 4-A of Bombay Act X of 1876 the Court had no jurisdiction to cancel the register.

The first defendant, the Secretary of State in Council, did not appeal from the judgment, but both the plaintiff and the other defendants 2 to 7 preferred appeals, and the High Court, as already stated, allowed the defendants' appeals and dismissed the suit. The judgment was delivered by the learned Chief Justice, who, after reviewing the evidence, and examining the judgment of the High Court in A.S. No.3 of 1876, held that by reason of the fifth proviso to Rule 8 of Schedule B of the Act excepting service watans from the rules, there was no valid decision under Act XI of 1852. Their Lordships have already given their reasons for not accepting this ruling. He also came to the conclusion that in the appeal to the High Court in the previous suit no reliance had been placed on Major Etheridge's decision or its confirmation, but the learned counsel for the appellant have satisfied their Lordships that the Ex. 337 in that case, which was referred to in the High Court's judgment is Ex. 471 in the present case. With regard to it, the learned Judges remarked :

"This entry no doubt correctly described the existing state of facts, and it is not clear that the Inam Commissioner arrived at the conclusion that the land was absolutely the property of the jahagirdars. But even if such were his conclusions, the plaintiff is not bound by a decision to which he was not a party, and the object of which was simply to settle the respective rights of the Government and the jahagirdars."

In the present case therefore the learned Chief Justice was mistaken in supposing that no reliance was placed on this document in the previous suit or that the High Court ignored it.

The learned Chief Justice was further of opinion that the District Judge's finding that the plaintiff's family was entitled to the watan offices could not be supported because it was founded on a wrong view as to the effect of Major Etheridge's recommendation and a wrong appreciation of the evidence on which he found that the jahagirdars had acquired a title to the lands and offices by adverse possession.

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He also held that the suit was barred under Art. 120 of the Limitation Act, except as to the claim for a refund of the contribution as it was not brought until more than six years after the Collector's order of the 26th November, 1906, and the framing of the Watan Register.

As the order could no longer be set aside, he also held that the contribution levied under it could not be recovered and accordingly allowed the appeal and dismissed the suit.

The plaintiff then preferred the present appeal to His Majesty in Council. The first defendant, the Secretary of State in Council, who, as already stated, did not appeal from the judgment of the District Judge, has not entered appearance or instructed counsel to support the judgment of the High Court dismissing the suit; nor have any of the other defendants, except the sixth defendant and the representatives of the seventh defendant, now deceased. These are respondents 4, 5A and 5B. Mr. Dunne, who appeared on their behalf, intimated that they were only concerned to defend their title as watandars and oppose the cancellation of the Watan Register, and that they were not interested in supporting the order imposing a contribution upon the plaintiff, or opposing the recovery of the contribution actually levied.

In these circumstances it will be convenient in the first place to deal with Mr. Dunne's contention on behalf of these respondents that Section 4 of the Bombay Revenue Jurisdiction Act X of 1876 bars not only the claim for the cancellation of the Watan Register but the claim for a declaration that the plaintiff and defendants 12 and 13, and not the Nagirs, defendants 2 to 11, are watandar patils and kulkarnis of the village. The section is as follows :—

4. Subject to the exceptions hereinafter appearing no Civil Court shall exercise jurisdiction as to any of the following matters:—

(a) claims against Government relating to any property appertaining to the office of any hereditary officer appointed or recognised under Bombay Act No. III of 1874, or any other law for the time being in force, or of any other village officer or servant, or

claims to perform the duties of any such officer or servant, or in respect of any injury caused by exclusion from such office or service, or

suits to set aside or avoid any order under the same Act or any other law relating to the same subject for the time being in force passed by Government or any officer duly authorised in that behalf, or

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In their Lordships' opinion these words are wide enough to preclude the Courts from entertaining any claim to the watan offices in opposition to the claim of the hereditary officers recognised or appointed under the Act, and also any claim for the cancellation of the Watan Register. To this extent, therefore, the plaintiff's case must fail.

As regards the other part of the case, as to which their Lordships unfortunately have not had the advantage of hearing arguments on behalf of the respondents, they are unable to agree with the ruling of the learned Chief Justice that the plaintiff is barred by limitation from suing for a return of the contribution levied on him, and for a declaration that the suit lands in his possession are not liable for such a contribution because he failed to file a suit to set aside the order imposing it within the period limited for filing such a suit. In their Lordships' opinion, if the order was illegal, the plaintiff was not bound to file a suit to set it aside, but was entitled to wait until it was enforced against him and the attempt to enforce it against him gave him a good cause of action which was admittedly within time.

It has, however, to be considered whether these claims are not barred under Section 4 of the Bombay Revenue Jurisdiction Act set out above, a question not dealt with by the High Court.

The District Judge was of opinion that they were not, because of the proviso to the section that

"If any person claim to hold wholly or partially exempt from payment of land revenue under . . . (k). . . an adjudication duly passed by a competent officer . . . under Act XI of 1852 which declares the particular property in dispute to be exempt; such claim shall be cognizable in the Civil Courts."

Land revenue in S. 3 is defined as including "any cess or rate authorised by Government under the provision of any law for the time being then in force," and the suit for a refund of the contribution levied under Act III of 1874 would, therefore, be barred unless exemption is claimed by virtue of an adjudication under Act XI of 1852, which declares the particular property to be exempt. According to the view taken by the District Judge from which their Lordships see no reason to differ, there was in this case an adjudication under Act XI of 1852 securing the revenue of the suit lands to the jahagirdar, and if this be so it has been pointed out by Sir George Lowndes

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that Act III of 1874, under which the contribution was levied, only extends to this village

"so far as its provisions may not conflict with the terms on which any such alienated village may have been secured to its proprietor."

In these circumstances their Lordships see no sufficient reason to differ from the District Judge's conclusions that the effect of the decision was to render the suit lands in the hands of the plaintiff and defendants 12 and 13 not liable to contribution under Act III of 1874, and to avoid the bar to a suit for its recovery under S. 4 of Act X of 1876.

Their Lordships do not consider it necessary or desirable for the due disposal of the suit to enter on any other question; and they will accordingly humbly advise His Majesty that the plaintiff's appeal be allowed and the decree of the High Court set aside, and that the plaintiff be given a decree declaring that the suit lands in the possession of plaintiff are not liable to contribution under Act III of 1874, and ordering a refund of the contribution sued for and that otherwise the suit be dismissed.

As regards the costs, their Lordships think that the senior Nadgirs and the Secretary of State should pay the costs of the appellant in the Lower Courts and of this appeal, and that the appellant should pay the costs of the junior Nadgirs, represented by Mr. Dunne, in the Lower Courts and of this appeal. The order will therefore be that respondents 1, 2, 6 and 7 are to pay the appellant's costs in the Lower Courts and of this appeal, and that the appellant is to pay the costs of the respondents 4, 5A and 5B in the Lower Courts and of this appeal.

Solicitor for appellants : *H. S. L. Polak.*

Solicitors for respondents : *T. L. Wilson & Co.*

K. J. R. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE CURGENVEN.

Govindaswami Koundan and two others ... *Appellants** (*Defendants* 1 *to* 3)

v.

Kandaswami Koundan and another ... *Respondents* (*Petitioner—Assignee decree-holder and 4th Defendant*).

Govindaswami Koundan *v.* Kandaswami Koundan.

Civil Procedure Code, S. 11, *Explanation V—Mortgage suit—Prayer in plaint for personal decree—Plea in written statement that personal remedy is barred—Preliminary decree silent on the point—Judgment not produced—Effect.*

The plaint in a suit on a mortgage contained a prayer for a personal decree. The written statement raised the plea that the personal remedy was barred but no issue was framed on the point. The preliminary decree was silent on the point but contained a clause that the defendant was personally liable for the plaintiff's costs. The decree-holder applied under O. 34, R. 6 of the Civil Procedure Code for a decree that the mortgagor be directed to pay the difference between the amount realised by the sale of the hypotheca and the amount due to him on his mortgage. The judgment was not produced.

Held (1) that the Court could not be said to have adjudicated upon the question of the personal decree or refused the personal remedy by its preliminary decree;

(2) that the matter was not constructive *res judicata* by force of Explanation V to S. 11 of the Civil Procedure Code, inasmuch as the Court was not to adjudicate upon the question until a later stage;

(3) that the absence of any reservation in the preliminary decree of the liberty to the decree-holder to apply for a personal decree did not disable him from doing so later.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in A. S. No. 35 of 1925 preferred against the order dated 23rd December, 1924 of the Court of the District Munsif of Palni in M. P. No. 118 of 1924, in O. S. No. 201 of 1914 on the file of the Court of the Additional District Munsif of Dindigul.

T. L. Venkatarama Aiyar for appellants.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for respondents.

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*A. A. O. No 434 of 1925. 3rd February, 1927.

Govindaswami Koundan v. Kandaswami Koundan.

Odgers, J.

The Court delivered the following

JUDGMENTS :—*Odgers, J.* :—In this case the assignee decree-holder has applied under O. 34, R. 6 of the Civil Procedure Code for a decree that the mortgagor be directed to pay the difference between the amount realised by the sale of the hypotheca and the amount due to the plaintiff on his mortgage. The request has been refused by the District Munsif and allowed on appeal by the Subordinate Judge, and it is against this allowance of the personal remedy that the appeal has come to us here.

The mortgage was one of 1905 and the suit on it was brought in 1912. The plaint in the mortgage suit is printed as Ex. A and it asks for sale of the mortgaged property and

"directing that if there be still any balance even after the auction sale, the 1st defendant personally and the family properties of defendants 1, 2 and 3 be held responsible therefor".

The argument of the learned vakil for the appellants is that the plaintiff having asked for that personal relief and the decree which appears as Ex. I being silent on the point, we must assume from the judgment (which is not forthcoming) that the Judge has decided this relief (*c*) in the plaint against the plaintiff and therefore the matter is either actually *res judicata* or is in the nature of an implied *res judicata* under S. 11, Explanation V of the Civil Procedure Code. The whole argument is based on the fact that the decree directs (1) that the defendants pay into Court a certain sum before a certain date and if they do so the property should be retransferred, (2) that if the payment is not so made, the mortgaged property or a sufficient part be sold, and (3) the 1st defendant is personally liable only for the plaintiff's ~~costs. It is said that that reference to personal~~ liability only for costs is a certain indication that an adjudication must have taken place by the Court on the relief (*c*) asked ror the plaintiff's costs. It is said that that reference to personal remedy must be taken to have been refused. The Subordinate Judge, however, holds that there is no ground for inferring any such refusal of the personal remedy in the decree. There is no issue about it and there was no adjudication thereon. The question is whether sufficient ground has been shown by the appellants to enable one to say that that finding of the Subordinate Judge cannot stand. In my opinion there is none. The form of the decree given in the old Code, No. 128 of the forms, does not contain any reference to the personal remedy though

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the plaint form (No. 109) does under the new Code; Form No. 45 of Appendix A is the form of the plaint in which the last clause asks for the personal remedy if the proceeds of the sale are found to be insufficient, and in the form of the decree given in Appendix D, No. 7, that proviso is attached to the decree in the shape of liberty being reserved to the plaintiff to apply, if necessary, for the personal remedy. The question shortly is: Is the fact that the personal remedy is asked for in a plaint and that nothing appears about it in the decree, enough to say that the plaintiff is for ever after barred from asking for it? If there has been no adjudication, as I hold, then it seems to me that the answer is clearly in the negative. In this view I am supported by the authority of the case in *Maliaperumal* v. *Nachiappa* (1) (under the old Code) where Best, J., decided that it is not necessary that the original decree in the suit should give any remedy beyond the property mortgaged and ordered to be sold, and the same remark was made by Bakewell, J., in a case in *Tirumalai Kadirvelusami Naicker* v. *The Eastern Development Corporation, Ltd.* (2).

It seems on principle that it would ordinarily be impossible for a Court to make any adjudication in the preliminary decree and the preliminary judgment on this matter. It would depend upon whether the mortgagor paid the amount within the time allowed; if he did not, whether when the property was brought to sale the proceeds were or were not sufficient to discharge the mortgage debt. That is a matter of some complication because the expenses of sale and various other matters can be added to the mortgage amount by the mortgagee and debited against the mortgagor. So that it is by no means an easy or simple matter or a matter as to which the Court would be in possession of sufficient facts in an ordinary case to decide on a preliminary decree, or very often in the case of a final decree also. It therefore seems to me that the fact that nothing is said in the preliminary decree about this matter is not one of *res judicata* so as to bind the plaintiff. It seems to me that, if one were to hold that this is so, grave injustice might very often be done, as I dare say it may be done in this case, if the plaintiff is denied his personal remedy. After all the defendants have got no merits because they owe the money, and there is no reason to my mind why the plaintiff should not invoke the aid of law to get himself paid provided his methods are legal and just. This seems

1. (1895) 5 M L J 294. 2. (1917) 33 M L J 382.

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to me to be a highly technical point, and I for one speaking personally do not see why technicalities should be set up and emphasized in favour of a defaulting judgment-debtor. We have been taken through various decisions on the assumption that there has been an adjudication. But as I hold that there has not been one it is quite unnecessary to go into these cases. It is said that this is a matter of costs,namely that the 1st defendant should be personally liable for costs and he must show that there was an adjudication as to this personal liability. It is impossible to tell without seeing the judgment why costs were awarded in this way instead of being added to the mortgage amount as is usual. It may be some personal default on the part of the 1st defendant which induced the trial Judge to say that the costs should be personally liable by him and executable on him immediately. To my mind it does not throw any light on the question that we have got to answer. In my view the appeal must be dismissed with costs.

Curgenven, J.

Curgenven, J. :—In reversing the District Munsif's order the learned Subordinate Judge has recorded findings upon three point: (1) that it was not competent to the Court in the course of the suit to pass a personal decree in the first instance, (2) that if it did so adjudicate upon the personal remedy, that would not be *res judicata* in respect of the subsequent application under O. 34, R. 6, and (3) that in point of fact the Court in this instance did not so adjudicate or refuse the personal remedy by its decree. It may be doubtful whether propositions (1) and (2) can be supported, but they do not arise unless upon proposition (3) we dissent from the finding of the Lower Appellate Court. Upon this point it is quite true that the plaint asks for a personal remedy, *viz.*, that

"if there still remains a balance even after the auction sale the 1st defendant personally and the family properties of defendants 1, 2 and 3 be held responsible"

and that the written statement contends that the personal remedy is barred. On the other hand, no issue was framed upon this point and it is undoubtedly the case that the Code does not contemplate in O. 34 that in framing a preliminary decree there should be an adjudication upon this question. The only support which can be given to the argument is afforded by that portion of the preliminary decree which provides that the 1st defendant should be personally liable for the plaintiff's costs. As my learned brother has said, in the absence of the judgment, it is not possible for us to ascertain in what circumstances that

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order was passed or whether it can be justified I have only to repeat, with the learned Subordinate Judge, that it does not by any means follow that the Court intended to adjudicate upon the admissibility of the personal remedy.

It has then been urged, as I understand the argument, that the Court failing so to adjudicate, the matter has become constructive *res judicata* by force of Explanation V to S. 11, Civil Procedure Code. No doubt that section would not apply in terms to a subsequent portion of the same suit, but let it be granted that the general principle of *res judicata* might be applicable in these circumstances. I think even so that inasmuch as the Court, if it is to follow the procedure laid down, is not to adjudicate upon this question until a later stage, the omission to do so cannot be considered in any way to prejudice the rights of the parties to raise the matter subsequently; and it is a matter of interest to be noticed that according to the forms under the Code of 1882, whereas the plaint form(Form No. 109 of Appendix of the 4th Schedule) contains a prayer which is substantially identical with the prayer for relief (*c*) in the present plaint, the preliminary decree for sale, Form No. 128, contains no passage in accordance with it. The only inference I can draw from that circumstance is that, if the principle expressed in Expl. V of S. 11 had been applied to suits framed and decreed in such circumstances, no subsequent application would have lain under S. 90 of the Transfer of Property Act on the ground that the principle of *res judicata* would have precluded it.

The only other point which has been raised is that the absence of any reservation in the preliminary decree of liberty to the decree-holder to apply for a personal decree disables him from doing so. Here again, as I have already said, the form of the decree under the former Code contained no such provision; yet it has not been shown to us that it was ever questioned that the liberty so to apply was thereby withheld. The decision in *Markandeya Sastri* v. *Sobhanadhracharyulu* (3) goes no further than to say that the decree which was there under reference should be brought into conformity with the form prescribed by the Civil Procedure Code. On the other hand, Bakewell, J., in *Tirumalai Kadirvelusami Naicker* v. *The Eastern Development Corporation, Ltd.* (2) has held, if any authority be required, that the absence of the proviso does not affect the right to apply. The form in fact I think merely

2. (1917) 33 M L J 382. 3. (1917) 6 L W 692.

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draws attention to the provision in R. 6 of O. 34, that application may be made if the sale of the hypotheca has not afforded sufficient to satisfy the decree. I think accordingly that there is no substance in this objection. I agree with my learned brother that the Civil Miscellaneous Appeal must be dismissed with coste.

N. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE CURGENVEN.

S. S. Balakrishna Aiyar and another ... *Appellants** (*Petitioners in C. M. P. No.* 4487 *of* 1926)

v.

Parvathammal and another ... *Respondents* (*Respondents in do.*)

Balakrishna Aiyar v. Parvathammal.

Letters Patent (Madras), cl. 15—*Judgment—Order directing stay of proceedings pending an appeal—Order conditional on giving security within a certain time and providing that otherwise petition should stand dismissed—Court's power to extend the time for furnishing security—Civil Procedure Code, S.* 148—*Proper remedy of aggrieved party.*

Pending an appeal to the High Court against the decree in a suit for the administration of the estate of a deceased person, the appellants applied for stay of proceedings and an order was passed in the following terms on 3rd September. 1926: "Petitioners to give security for Rs 44,000 as found by the Commissioners to the satisfaction of the Lower Court within three months. Otherwise the petition to stand dismissed with costs". On 3rd December, 1926 the petitioners put in an application to extend the time for furnishing security but this was dismissed on 17th December, 1926 on the ground that the Lower Court had found the security to be insufficient and therefore the order of the 3rd September had become effective and the proper remedy of the petitioners was to apply for a review of that order or to apply to revise the Lower Court's finding that the security was insufficient.

An appeal was filed against this order.

Held, that the order dated 17th December, 1926 was not a "judgment" within the meaning of cl 15 of the Letters Patent and consequently no appeal lay against that order.

Tuljaram Row v. *Alagappa Chettiar,* (1910) I L R 35 M 1 . 21 M L J 1 (F. B.) referred to.

Obiter: The Court has no power to extend the time in such a case and the proper remedy is to apply to review the order or to revise the Lower Court's order that the security was insufficient.

Case-law discussed.

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*L P A No, 410 of 1926. 4th March, 1927.

Balakrishna Aiyar v. Parvathammal.

Appeal under cl. 15 of the Letters Patent against the Order of the Hon'ble Mr. Justice Jackson, dated 17th day of December, 1926, and made in C. M. P. No. 4487 of 1926, praying the High Court to extend by two months the time for furnishing security in pursuance of the order of the High Court in C. M. P. No. 1874 of 1926 in A. S. No. 150 of 1926 preferred to the High Court against the decree of the Court of the Subordinate Judge of Trichinopoly in O. S. No. 32 of 1923.

T. M. Krishnaswami Aiyar and *M. S. Vaidyanatha Aiyar* for appellants.

K. G. Srinivasa Aiyar for respondents.

The Court delivered the following

JUDGMENTS :—*Odgers, J.* :—This is a Letters Patent Appeal from the order of Mr. Justice Jackson in C. M. P. No. 4487 of 1926 dated 17th December, 1926. The suit in which the order was made was one for administration of the estate of a certain deceased person and the defendants asked for stay of proceedings in the suit before the Subordinate Judge. On the 3rd September, 1926, Mr. Justice Jackson made an order of which the following is the relevant portion: Odgers, J.

"Petitioners to give security for Rs. 44,000 as found by the Commissioners to the satisfaction of the Lower Court within three months. Otherwise the petition to stand dismissed with costs."

On the 3rd December, 1926, the petitioners put in an application to extend the time for furnishing security. The matter came up on the 17th December, 1926 before Mr. Justice Waller who transferred it to Mr. Justice Jackson for hearing. Mr. Justice Jackson found that the period had expired as the Subordinate Judge had found the security to be insufficient and that therefore his order of the 3rd September, 1926 became effective, *i. e.*, that the petition was dismissed with costs. The learned Judge pointed out that the petitioners, proper course was either to apply for a review of the learned Judge's order or to apply to revise the Subordinate Judge's finding. He was of opinion that he could not cancel the dismissal contained in the order of 3rd September and extend the period. It is against that order that the Letters Patent Appeal is brought.

The first question is whether any appeal under clause 15 of the Letters Patent lies in this case, and whether the order of Mr. Justice Jackson of the 17th December is a judgment. The question was considered by a Full Bench of this Court in *Tuljaram Row* v. *Alagappa Chettiar* (1) and the then Chief

1. (1910) I L R 35 M 1 : 21 M L J 1 (F B).

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Odgers, J.

Justice (Sir Arnold White) said *inter alia* that he was not prepared to infer that the word "judgment" in S. 15 is to be deemed to include any order in any interlocutory proceeding but that an adjudication is a judgment within the meaning of the clause if its effect is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if it is not complied with, is to put an end to the sut or proceeding, but that an adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not a judgment within the meaning of the Letters Patent. He thought an order on an application for an interim injunction or for the appointment of a receiver is a judgment within the meaning of the clause as although it was ancillary to the suit it was with a view to rendering the judgment effective if obtained. Mr. Justice Krishnaswami Aiyar was of opinion that, however wide the interpretation of the term 'judgment' may be, it ought not to be understood to include interlocutory orders. That learned Judge did not recognise any distinction in principle between an order staying execution or refusing to stay and an order directing security for costs in an appeal. He thought that those orders affect the rights of parties though temporarily and must be deemed to fall within the definition of judgment.

I am of opinion that this order of Mr. Justite Jackson is not a judgment. It did not affect the rights of the parties even temporarily nor in my view could it have any effect for good or ill on the ultimate determination of the suit. I therefore think on this short point the appeal should be dismissed.

Assuming I am wrong, I proceed to discuss the matter on the arguments addressed to us. The first argument is that the matter falls under S. 148, Civil Procedure Code:

"Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may in its discretion from time to time enlarge such period even though the period originally fixed or granted may have expired."

It is said that S. 148 applies as by O. 41, R. 5 an appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the appellate Court may order. The Code nowhere says that where a conditional order is made and that, if the condition be not complied with, the petition shall stand dismissed, this can be extended or revived by an order passed after the time allowed has expired.

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Odgers, J.

Badri Narain v. *Sheo Koer* (2) is relied on by the appellants as an authority for the proposition that a Court can extend the time after its expiration. That was a case of security for costs under what is now O. 41, R. 10 of which Sub-R.2 provides that where such security is not furnished within such time as the Court orders, the Court shall reject the appeal. In *Badri Narain* v. *Sheo Koer* (2) their Lordships of the Privy Council held that under this rule (old S. 549) the Court had power to extend time even though the period of time first fixed had expired. But there the order itself did not contain words which the order of Jackson, J., contains, namely:

"otherwise the petition to stand dismissed with costs."

In other words, O. 41, R. 10 requires some further order after the default has been made before the proceeding comes to an end. Another case of the Privy Council cited was *Sabitri Thakurain* v. *Savi* (3), where, on an application by a party after the time given to the opposite side for furnishing security for costs had expired, he applied for the dismissal of the appeal; whereupon the petitioner for the first time applied to proceed in *forma pauperis;* the Privy Council held that the words of O. 41, R. 10 (2) are mandatory and not permissive and that the High Court could not possibly grant permission to continue the appeal in *forma pauperis* as such permission would in fact contradict the terms of the sub-rule; in other words, the application sought to revive a matter which was dead. The case *Amir Mandal* v. *Mohan Chandra Mandal* (4) is relied on where the Court, if one may respectfully say so, proceeded more in *ad misericordiam* than perhaps according to the strict law; no law is quoted in the judgment, and the learned Judges appear to have been swayed by the fact that the Court-fee ordered to be paid within a month was not so paid because the stamp-vendor had no stamp of the value required though the price was tendered to him on the proper day. There the learned Judge decided "to reinstate the appeal" there having been no laches or negligence on the part of the petitioner. It does not seem to me that the case can form any authority for the present.

Two cases are quoted from Chancery Division, *Collinson* v. *Jeffery* (5) which was a redemption action. Two months were given to lodge the money "in default the action to be dismissed with costs". There was, as the learned Judge found, a

2. (1889) I L R 17 C 512 (P C). 3. (1921) 40 M L J 308 (P C)
4. (1922) I L R 3 Pat. 337. 5. (1896) 1 Ch. 644.

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bona fide mistake with regard to the time allowed and it is also to be noted that a further order was necessary in order to dismiss the action. As Kekewich, J., observed:

> "It is not the practice to say that the action is dead, for it is necessary in this and other analogous cases to make a further application in order to obtain the absolute dismissal of the action. There is another form of order available and appropriate where the Court thinks that severe terms should be imposed, namely, that on failure to do certain acts within a specified time, then the action do stand dismissed without further order. In this case no such words are in the order."

Then in *Re Macintosh and Thomas, Solicitors* (6), a judgment of the Court of Appeal, the decision turned wholly on the construction of O. 65, R. 27, Reg. 57 of the rules of the Supreme Court. The Regulation gives the Taxing Officer power to limit or extend the time for any proceeding before him. Even there Vaughan Williams, L. J., was inclined to agree with the argument that on the actual words of the order itself *prima facie* the power to extend must be exercised within the limit of one month, *i. e.*, the original period granted. Romer, L. J., distinguishes the Queen's Bench Division cases cited below as cases where there was no power in the Court to extend the time and as he points out

> "nothing could be done in these cases to escape the exigency of the order except by way of appeal."

Whereas in the case before the Court of Appeal the order for taxation expressly provided for an extension of the time within which the certificate of the Taxing Master may be made, and within which the order is to be effective. Both Vaughan Williams, L. J., and Stirling, L. J., repeat the statement that the decision turns entirely on the wording of the regulation. Turning to the Queen's Bench cases which were thus distinguished: *Whistler* v. *Hancock* (7) was an order dismissing an action for want of prosecution unless the statement of claim should be delivered within a week. The week expired and the Court held that there was no jurisdiction to make an order subsequently extending the time for the delivery of the statement of claim. The plaintiff took out a summons to set aside an appearance, *i. e.*, of the defendant, and if he could have obtained an order to that effect before the week was out, he would have been the victor (*per* Cockburn, C. J.). In

6. (1903) 2 Ch. 394. 7. (1878) 3 Q B D 83.

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King v. *Davenport* (8) an order was made on the 6th of May dismissing the action for want of prosecution if the statement of claim were not delivered within 14 days which expired on the 20th of May. On the 19th the plaintiff took out a summons for further time, the summons being returnable on the 20th. It was not served till the 20th and was adjourned by consent in writing till the next day. The summons was heard on the 21st when the Master made an order giving 7 more days for the delivery of the statement of claim. The Court held that the action was at an end on the 20th of May and the Master had no jurisdiction to give further time. These cases seem to me entirely in point and the last case bears also on another point because it is urged before us that the fact that an application was put in on the 3rd of December, *i. e.*, the last day of the stay, was sufficient to extend the stay because it is not the fault of the petitioner that the Court heard his application some days or weeks after the petition is put in. To admit this doctrine seems to me to be most dangerous. If it could be held that an order dates back to the date of application and the application is not heard for several weeks or possibly months, it would mean that merely by putting in an application the petitioner gets several weeks or months more additional stay. Suppose a man is given three months for finding security for a sum of money, and does nothing whatever within the three months, and on the last hour of the last day of the three months he puts in an application to extend the time, his case comes into the list a month or two afterwards, he then busies himself about the finding of the security or the money and when his application comes on he is able to say that he has the security or the money ready, that is to stay, that instead of his original three months he has four or five months or possibly more in which to carry out the order. It seems to me that the law cannot intend a mere application to in any way act as an automatic extension. The case for this proposition in *Sivakolundu Pillai* v. *Ganapathi Aiyar* (9) is relied on. There there was an attachment by precept and it was contended that it had come to an end at the expiry of two months from the date it was made. A petition was filed before the expiry of the two months and an order (the case does not say when passed) was made extending the period of attachment for six months which was again extended before the expiry of that portion of six

8. (1879) 4 Q B D 402. 9. (1916) 3 L W 336.

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months by another six months. The Court thought that the delay of the Court in passing orders on the petition for extension cannot be allowed to prejudice the petitioner and the order granting extension must be given retrospective effect as if passed on the date of the petition. With regard to the second period it does not appear that this dictum applies, although it may apply with regard to the first. As I have said, if this judgment means that a mere application can automatically extend the time, I am, with respect, unable to accept it. *Chandra Goundan* v. *Palaniappa Goundan* (10), the decision of a single Judge of this Court, has no application as the order did not say that if the condition was not complied with, the application was to stand dismissed.

As we were about to deliver judgment our attention was called to the recent opinion of the Full Bench in O. S. A. No. 120 of 1925 where it was held that the Court has power to extend the time under S. 13 of the Arbitration Act in the case of remitted awards even though the award has been delivered; in other words, S. 12 applies to awards remitted and delivered under S. 13. This opinion in my judgment carries the present case no further. It is confined to the construction of certain sections in the Arbitration Act which Act contains certain powers for extending the time in the same way as O. 65, R. 27, Reg. 57 in the Annual Practice does. There is no warrant for holding that the extension of time permitted by those sections is of universal application. On the contrary the Full Bench has recently held [*The Commissioner of Income-tax, Madras* v. *Mothay Ganga Raju* (11)] that under S. 66 (2) of the Income-tax Act, 1922 neither the Court nor an official has any power to extend the time limited by the section.

I think therefore the order of Jackson, J., was right and that the method adopted by the appellant is wrong and that, as pointed out by the learned Judge, they ought to have applied to review his order or to revise the Subordinate Judge's finding, *i. e.*, that the security tendered was insufficient. On all these grounds the Letters Patent Appeal must be dismissed with costs.

Curgenven, J.

Curgenven, J. :—I agree that the order appealed against is not a "judgment" as that term has been explained in *Tuljaram Row* v. *Alagappa Chettiar* (1) within the meaning

1. (1910) I L R 35 M 1: 21 M L J 1 (F B).
10. (1917) 42 I C 961: 23 M L T 7.
11. (1926) 52 M L J 273 (F B).

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Curgenven, J.

of cl. 15 of the Letters Patent, and is, therefore, not appealable. The appeal, assuming it to lie, should also, in my view, be dismissed upon its merits.

It has not been contended before us that it is beyond the competence of a Court to pass an order allowing an application upon certain terms and providing that, if within the time allowed, these terms are not complied with, the application shall automatically, and without further interposition by the Court, stand dismissed. If any such contention were raised, it could be met by a reference to a number of cases, English and Indian, where orders of this nature have been recognised by the Courts. Accepting, then, that an order of this kind, which remains open for a fixed period, and then, upon non-compliance with the stipulation, closes by force of its own terms, is a permissible form of order, it must, in my view, follow that as soon as the time allowed has expired and the dismissal of the application has taken place, no variation of the terms of the order can be made. The position is, in fact, precisely the same as though the order had never been passed; and the power to extend time given by S. 148, C. P. Code, cannot be invoked because not only has the 'period originally fixed or granted' expired, but there is no previous order still current upon which an order extending time could operate. This was the view taken in *Whistler* v. *Hancock* (7) where Cockburn, C. J., says:

"It cannot be contended that the taking out of a summons to set aside the appearance in the meantime could keep the action alive after the period when by the operation of the master's order it was defunct."

The question thus is whether the original order of Mr. Justice Jackson was of this character. There can be no doubt, from what he says in his subsequent order, that it was his intention to pass such an order, and I do not think that any other construction can be placed upon the order which he in fact did pass. If, upon failure to give security as provided, the petition was 'to stand dismissed with costs', there was no need for any further order dismissing it so soon as the time allowed had expired. Accepting this view, I do not think that there is anything in the cases cited which would support the proposition that the Court could still have extended the time, because it has nowhere been said that this can be done once an order is 'defunct'. This was clearly recognised by Kekewich, J., in *Collinson* v. *Jeffery* (5) where he said, upon an argument being advanced that the action was dead, "if that

5. (1896) 1 Ch. 644. 7. (1878) 3 Q B D 83.

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is the right view, the matter is beyond my power," adding, however, that in the case before him "a final stroke is required to effect death." It was found, in fact, that a further application was necessary in order to obtain the absolute dismissal of the action and that circumstance, I think, distinguishes that case from the present one. The conclusion reached by the Court of Appeal in *Re Macintosh and Thomas, Solicitors* (6) was to much the same effect. Byrne, J., who originally heard the motion, observed:

"I think that the force of the words 'or this order is to be of no effect' destroys the proceeding altogether; that there is no longer a proceeding under which the taxation can take place, and that the power to enlarge the time is meant to be power to enlarge the time while there is a pending matter. But for the final words 'or this order is to be of no effect,' I think the order would be a subsisting order and the time could be extended."

The Lords Justices of Appeal agreed in general with this view, but in the special circumstances of the case—the order for taxation expressly providing for an extension of the time within which the certificate of the Taxing Master could be made —held that there was still power to extend after the expiry of the time originally fixed. And so here, if Jackson, J.'s original order had required the security to be given "within three months or within such further time, as by an order passed before or after the expiry of the three months, may be allowed. Otherwise the petition to stand dismissed with costs," it would be reasonable to hold that the order of dismissal would not prevail against a subsequent application for an extension. But I do not think that Section 148, C. P. C., can be applied to achieve the same object.

The test to determine, in cases of this nature, whether power still exists to extend time is, in my view, whether the proceeding in which time was originally granted is still pending or has been disposed of. This point was brought out by Krishnan, J., in *Chandra Goundan* v. *Palaniappa Goundan* (10) where an *ex parte* decree had been set aside on condition that the defendant paid the plaintiff's costs within a specified time. The time expired without payment, but neither by the original order nor in any order passed subsequently was the application dismissed. As the learned Judge observed:

6. (1903) 2 Ch. 394. 10. (1917) 42 I C 961 : 23 M L T 7.

Balakrishna Aiyar v. Parvathammal.

Curgenven, J.

"It does not follow that the petition had been disposed by the mere non-compliance without final order of rejection being passed"

and he was inclined to hold that if such a final order had been passed, an application by way of review would have been required to enable the Court to restore the proceeding to its file and pass fresh orders thereon. This appears to me to be the only consistent view to take of the effect of all orders which, either by efflux of time or by express subsequent order, have resulted in a dismissal of the original application.

When this judgment was ready for delivery, the opinion of the Full Bench in *Martirosi* v. *Subramaniam Chettiar* (O. S. A. No. 120 of 1925) was brought to our notice. The point there decided is that the Court has power to extend the time fixed by S. 13 of the Arbitration Act for the return of a remitted award, although the arbitrators or umpire may already have delivered the award The decision is largely based upon the terms of the Act, and the consideration of cases arising out of the corresponding English Statute; but I do not think that it involves the acceptance of any principle incompatible with what I have said above. The difference is that in the one case, expiry of the time fixed puts an end to the proceeding, whereas in the other, it has no such effect, but the award, though made beyond the time fixed, may be retrospectively validated. If expiry of the time originally allowed absolutely and finally extinguished the arbitrator's powers, this could not be done. But under the terms of the Act, the Full Bench thinks that this inference need not be drawn.

I agree that the Letters Patent Appeal should be dismissed with costs.

N. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE RAMESAM.

M. K. L. M. Muthiah Chettiar and others ... *Petitioners** (*Defendants* 1 *and* 2)

v.

P. Loka Singh ... *Respondent* (*Plaintiff*).

Muthiah Chettiar v. Loka Singh.

Madras Small Cause Court Rules, O 8, R. 5—Order for filing written statement under—Decree for disobedience of—Legality—Conditional order directing filing of statement—Effect—Pleas—Opportunity to state—Affording of, at any stage, provided no delay caused by such indulgence—Necessity.

The order requiring a written statement for the disobedience of which a decree can be passed under O. 8, R. 5 of the Madras Small Cause Court Rules must be an unconditional order requiring a written statement to be filed.

An order "defendants to file pleas, if any," is not such an unconditional order, and a decree cannot be passed under O. 8, R. 5 for the disobedience of such an order.

Parties should be allowed to state their pleas whenever possible provided no further delay is caused by such indulgence.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Full Bench of the Court of Small Causes at Madras dated the 15th day of December, 1924 in New Trial Application No. 233 of 1924 preferred against the decree of the Court of Small Causes at Madras in S. C. S. No. 5751 of 1924.

N. Rajagopalan and *R. Srinivasa Aiyangar* for petitioners.

K. V. Sesha Aiyangar for respondent.

The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.*—The suit out of which this revision petition arises was filed in the Small Causes Court, Madras, in April, 1924 against three defendants on a hundi. 2nd defendant is the maker of a hundi. It was drawn in favour of the 3rd defendant who endorsed it in favour of the plaintiff. The 1st defendant was impleaded on account of a varthamanam letter, Ex. B, executed by him when the plaintiff alleged that the hundi was presented at Rangoon and was dishonoured. The 1st defendant is sued on the ground that he had opened a shop in Madras and leave to sue was obtained against the others. Along with the suit an application for attachment before judgment was also filed against the 1st defendant and some goods

*C R P No. 23 of 1925. 15th March, 1927.

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belonging to him were attached. The 1st defendant appeared and got the goods released. The case was then posted to 24th July. On that day Mr. R. Srinivasa Aiyangar appearing for the plaintiff asked for time to state his defence. He also undertook to file a vakalat for the 2nd defendant. The Chief Judge before whom the case was posted passed the following order:—

"Adjourned, at defendants' (1 and 2) vakil's request, as his clients are unable to be present owing to the floods, to 27th August, 1924. Defendants 1 and 2 to file pleas, if any, on or before 5th August, 1924 with copy to plaintiff."

No written statement was filed on the 5th of August. It is said that the 1st defendant was unwell and on the 21st of August Mr. Srinivasa Aiyangar applied for extension of time for filing a written statement. He stated in it that the medical certificate has not reached him by mistake. This petition was rejected on the 22nd. On the 27th the Chief Judge was absent and the case came up before the 2nd Judge. On that day Mr. Srinivasa Aiyangar stated his pleas for the 1st defendant. They were noted by the 2nd Judge but afterwards it was pointed out to him that an application for extension of time has previously been rejected by the Chief Judge. So he struck off the noted entries and adjourned the case to 3rd September, directing the 1st defendant to pay the day costs. When the case came up before the Chief Judge again on 3rd September, the 1st defendant was again ready to state his pleas but he was not allowed to do so and on the ground that the 1st defendant disobeyed the orders of the Court requiring a written statement to be filed a decree was passed against him. After a futile attempt to prove the case against the 3rd defendant it was ultimately withdrawn against him.

There was an application for a new trial before the Full Bench. This was disposed of by a judgment dated the 15th December. The revision petition is against that order.

Two points have been argued by Mr. Srinivasa Aiyangar for the petitioners who are the 1st and 2nd defendants. The first point argued is that the Small Cause Court has no jurisdiction to pass a decree under O. 8, R. 5, which does not apply. This order enables a Court to pass a decree if the defendant does not file a written statement as required by the Court. The question therefore is whether there is an order by the Court requiring the 1st defendant to file a written statement. The only order we have got in this case has already been set forth by me above. In my opinion, the order "defendants 1 and 2 to file pleas, if

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any, on or before 5th August" is not an order directing them to file a written statement by the 5th of August. The use of the words "if any" shows that they are to file a written statement only if they have any defence to make. It is true that it now turns out that they have a defence to make. But it was open to them to state that they had none. An order in that conditional form requiring them to file a written statement if they have any defence to make cannot be regarded as an unconditional order to file a written statement and in my opinion the order requiring a written statement for the disobedience of which a decree can be passed under O. 8, R. 5 must be an unconditional order requiring a written statement to be filed. In my opinion, the order passed on the 24th July cannot be regarded as such an unconditional order. Mr. Sesha Aiyangar for the respondent contends that it must be regarded as an unconditional order requiring a written statement because under another provision of the Provincial Small Cause Rules unless the Court requires a written statement one cannot be received. This is true; but an order cannot be construed with reference to another provision of the law. The plain meaning of the order is an order permitting them to file a written statement if they choose to have any defence To file pleas certainly involves filing written pleas; but an order permitting them to file written pleas, whether it is a proper order or not under the other provision, cannot be regarded as an absolute order requiring the filing of the written statement. It is unnecessary to consider whether it is a proper order under the other provision. In my opinion the passing of a decree against the 1st defendant under O. 8, R. 5 is not justified and as there is a material irregularity we are justified in interfering in revision.

The second point argued is that the Chief Judge erred in not permitting the 1st defendant to state his pleas. If this is the only point in revision I would not certainly interfere in this case but seeing that the case will have now to go before the Chief Judge of the Small Cause Court I think I ought to consider this point also. The adjournment from the 24th July was due to floods and it is said that the 1st defendant was ill in August; it may be this was not proved to the satisfaction of the Court. It is said that the vakil must have known the pleas of the 1st defendant because he appeared in connection with the application for attachment before the judgment in April; but it is noteworthy that on that occasion Mr. Srinivasa Aiyan-

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gar applied for a search of the plaintiffs' documents and he noted on the search petition "Seen only the hundi, Ex. A. No varthamanam". The varthamanam shows that it was filed in Court on the 16th of April. Why it was not shown to Mr. Srinivasa Aiyangar on the 25th of April is not very clear. There may be some matter for enquiry here. Anyhow, he applied for a certified copy on the 29th of April and got it only on 2nd August. He was ready to file his pleas on the 21st of August but he thought he should file a verified written statement. Assuming that there was some negligence on the part of the 1st defendant, which is not very clear, still it is desirable that parties should be allowed to state their pleas whenever possible provided no further delay is caused by such indulgence. Mr. Srinivasa Aiyangar was ready to state and did state his pleas on the 27th of August and on the 3rd September. Under such circumstances I do not think the ends of justice are served by shutting him up and preventing him from stating his defence. In my opinion, now the case is going back on the other ground, I think it will be convenient to permit the 1st and 2nd defendants to file their written statements or state their pleas before the case is posted for trial. The case will accordingly be remanded for fresh trial and disposed of according to law. Costs to abide the result.

Kumaraswami Sastri, J. :—I entirely agree.

A. S. V. *Case remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT :—LORD SHAW, LORD PHILLIMORE, LORD DARLING, MR. AMEER ALI AND SIR LANCELOT SANDERSON.

Saheb Rai, since deceased (now represented by Jaideo Singh) and others ... *Appellants**

v.

Shafiq Ahmad and others ... *Respondents.*

P. C.

Saheb Rai v. Shafiq Ahmad.

Maintenance—Step-mother—Sum received from step-son by, for maintenance—Her interest in—Presumption—Step-mother made liable for definite share of her husband's debts as well as given definite share of his assets—Arrangement to that effect, voluntary—Effect.

Prima facie when an arrangement is come to by which a step-mother receives a sum for maintenance from her step-son, the presumption is that an absolute interest is not intended to be conferred upon her. But where by the arrangement she is made in point of fact responsible for a definite

*P C Appeal No. 162 of 1924. 10th February, 1927.

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Saheb Rai *v.* Shafiq Ahmad.

share of her husband's debts as well as being made entitled to a definite share of her husband's assets, and the arrangement is the result of a transaction of a voluntary nature entered into by the step-son and the step-mother with considerations *pro* and *contra*, that presumption is rebutted and she must be held to take an absolute interest.

Appeal (No. 162 of 1924) from a decree of the High Court, Allahabad, dated 13th November, 1922.

Sir G. Lowndes, K. C. and *E. B. Raikes* for appellants.

A. M. Dunne, K. C. and *B. Dube* for respondents.

10th February, 1927. The Judgment of their Lordships was delivered by

Lord Shaw.

LORD SHAW.—Various questions have been raised in this appeal, and having fully heard the argument for the appellants on one point, to be alluded to, their Lordships do not think it necessary to call on Counsel for the respondents.

The law appears to their Lordships to be correctly laid down by the High Court in the following sentences:—

"*Prima facie* when an arrangement of this nature is come to by which the step-mother is to receive a sum for maintenance the presumption would be that in no case could an absolute interest be intended to be conferred;"

But the Court goes on to say:—

"But in the present case a presumption of this kind must yield to the other evidence which we have before us. We do not see how any theory that a grant for maintenance was being made to Mohan Kunwar by her step-sons can be reconciled with the fact that the lady was being made responsible for a definite share of the debts which had been incurred by her late husband."

Their Lordships have considered both sides of these propositions and agree with both, but in regard to the latter they have further considered the exact nature of the transaction which is recorded in the deeds, and, as the result of their consideration, they find that the absolute interest which is in question in this case was created not by way of a transaction as in one of the precedents cited referred to, following a decree of the Court, but as the result of a transaction of a voluntary nature entered into by the two sons and the step-mother with considerations *pro* and *contra*; and upon the whole their Lordships are of opinion that the view taken by the High Court must prevail.

The lady was made in point of fact responsible for a definite share of the debts as well as being made entitled to a definite share of the assets of her late husband. That transaction has stood, their Lordships are aware, for a very long period of time. There has been nothing cited to shake the facts which the docu

ments record, and the balance of opinion is accordingly in favour of allowing a transaction which has in fact (through the fault of the appellants) remained so long unchallenged, to stand.

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Saheb Rai v. Shafiq Ahmad.

Lord Shaw.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants : *Douglas, Grant & Dold.*

Solicitor for respondents : *H. S. L. Polak.*

Appeal dismissed.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT :—VISCOUNT DUNEDIN, LORD SHAW, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Srimati Nayan Munjari Dasi ... *Appellant**

v.

Khagendra Nath Das and others ... *Respondents.*

P. C.

Srimati Nayan Munjari Dasi v. Khagendra Nath Das.

Landlord and tenant—Compromise decree between—Construction—Rent—Increase of—Landlord's right of—One increase only, tenants being entitled to hold at that figure in perpetuity—Prevailing rate of rent for land in neighbourhood—Increase according to—Right of.

A suit instituted in 1895 by the father of the defendants against the 1st plaintiff's deceased husband to have him ordained to execute a perpetual lease was compromised. The terms of the compromise were that for the seven years from 1896-1903 the tenants (defendant's father and his representatives) should pay a rent of Rs. 4-6-0, and then it continued as follows —

"That after the expiry of the aforesaid stipulated period ending in the month of Chaitra 1309 B S., the plaintiff shall possess and enjoy the said land on payment of the then proportionate reasonable ground rent. On the plaintiff agreeing to pay proportionate ground rent of the said land, the defendant shall not be able to settle the said land with any other person; but if the plaintiff refuses to pay such rent, he shall amicably surrender such land; if he fails to do so, then the defendant shall be able to eject him from the said land, and the latter (the plaintiff) shall be bound to pay to the defendant such damages as he will suffer on account of breach of the said agreement."

The defendants contended that the true meaning of the clause above set out in the compromise decree was to allow one increase only to be made, and that, once such an increase was made, the rent must thereafter continue at that figure in perpetuity.

Held, overruling the contention and agreeing with the High Court, that the right construction of the compromise decree was that the lease

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*P. C. Appeal No. 109 of 1925. 7th March, 1927.

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was binding so long as the tenants were content to pay the prevailing rent of such land as such prevailing rent might be gathered from what was given for land in the neighbourhood.

Appeal (No. 109 of 1925) from a decree of the High Court, Calcutta, dated 15th April, 1924.

Sir G. Lowndes, K. C. and *E. B. Raikes* for appellant.

J. M. Parikh for respondents.

7th March, 1927. The Judgment of their Lordships was delivered by

Viscount Dunedin.

VISCOUNT DUNEDIN.—This suit is raised by the guardian of a female lunatic who is entitled to the property of certain lands at Howrah against the occupying tenants thereof. The plaintiff alleged that the defendants, now respondents, were tenants at will who had hitherto paid a rent of Rs. 7-8 per mensem. But a notice has been served on them to pay henceforth a rent at the rate of Rs. 3 per mensem per cottah.

The land in extent is, roughly speaking, 22 cottahs, so that the rent demanded is Rs. 66, now alleged to be the prevailing rent of land in the neighbourhood. In the event of the defendants not signifying their willingness to do so, the plaintiff holds herself entitled to evict them.

The plaintiff alleged that no answer had been given, and craved eviction, but alternatively, if eviction was not granted, then a decree declaring that the rent henceforth was to be Rs. 3 per mensem per cottah.

The history of the terms of the tenancy are as follows:-

In 1895 a suit had been instituted by the father of the defendants against the first plaintiff's deceased husband to have him ordained to execute a perpetual lease. This suit was compromised. The terms of the compromise were that for the seven years from 1896-1903 the tenants should pay a rent of Rs. 4-6-0, and then it continued as follows:—

"That after the expiry of the aforesaid stipulated period ending in the month of Chaitra 1309 thirteen hundred and nine B S, the plaintiff shall possess and enjoy the said land on payment of the then proportionate reasonable ground rent On the plaintiff agreeing to pay proportionate ground rent of the said land, the defendant shall not be able to settle the said land with any other person, but if the plaintiff refuses to pay such rent, he shall amicably surrender such land; if he fails to do so, then the defendant shall be able to eject him from the said land, and the latter (the plaintiff) shall be bound to pay to the defendant such damages as he will suffer on account of breach of the said agreement.

In 1903 the rent was accordingly enhanced to Rs. 7-8-0, and that was the rent which was paid as at the date of this suit.

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The position taken by the defendants, now respondents, in this suit was that the true meaning of this clause was to allow one increase only to be made, and that having been made in 1903 the rent must thereafter continue at that figure in perpetuity. Alternatively, they denied that Rs. 3 per mensem per cottah was the prevailing rate in the neighbourhood.

The case was tried in the Court of the Munsif of Howrah. That Judge settled certain issues, of which three may be mentioned:—

> What were the terms of the Solenamah in Title Suit No. 46 of 1895 of the Court of the Second Subordinate Judge, Hooghly? Have the terms of the Solenamah been fulfilled by the defendants? If so, can the plaintiff claim any further enhancement of rent or ejectment?
>
> What is the nature of the tenancy of the defendants? Is it ejectable? To what relief, if any, is the plaintiff entitled?

One witness on each side was examined. The witness for the plaintiff said that the prevailing rent for such land was Rs. 3 per mensem per cottah and that he had Collector's papers to show this. No cross-examination was had as to these papers.

The witness for the defence simply denied that this was the proper prevailing rate.

The Munsif held on the fourth issue that the true meaning of the compromise was that the landlord could enhance the rent after the seven years up to the prevailing rent of neighbouring lands, and that if that was not paid, he could ask for ejectment, but he said he did not consider that there was any proof of what the prevailing rent was. Issue 5 had been settled by this answer to Issue 4 and on Issue 6 he dismissed the suit.

Appeal was taken to the District Judge at Howrah. His view of the compromise decree was that the tenant might ask for one seven-years term at an enhancement of rent, but that after that the tenancy was a tenancy at will. He accordingly allowed the appeal and decreed khas possession, *i.e.*, he granted ejectment.

A second appeal was then taken by the defendants to the High Court. That Court restored the judgment of the Munsif, holding that the meaning of the compromise term was that so long as rent was paid at the prevailing rate, the tenants were entitled to hold. The question of the rate they dealt with by merely saying that the Munsif had found that the rate of Rs. 3 was not proved.

Their Lordships are of opinion that the High Court has put the right construction on the compromise decree—that is to say,

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Srimati Nayan Munjari Dasi v. Khagendra Nath Das.

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that the lease is binding so long as the tenants are content to pay the prevailing rent of such land as such prevailing rent may be gathered from what is given for land in the neighbourhood. They could not, however, come to the conclusion that the question of what the prevailing rent truly is has been satisfactorily dealt with. The Munsif was, they think, too peremptory in deciding that there was no evidence. The evidence of the plaintiff's witness was quite clear, and he said that he had Collector's documents to show that what he was stating was true, and there was no cross-examination on the point.

Their Lordships think it probable that the efforts of the pleaders were too much directed to the extreme position asserted on either side.

The parties have shown themselves very reasonable and have consented to abide by the determination of a person to be appointed by the Court.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed and the case remitted to the High Court for them to appoint an independent person to fix what is the prevailing rent in the neighbourhood and report, and on that report being received the High Court will pronounce a decree accordingly—that is to say, if the defendants are willing to pay they shall continue as tenants, but if not, eviction shall be granted. No parties shall have costs either before the Board or in the Courts below, and any costs already paid must be returned.

Solicitors for appellant : *Watkins & Hunter.*

Solicitors for respondents : *Donnel & Johnson.*

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

Patinhare Koonthilot Mayankutti ... *Appellant** (*Defendant*)

v.

Kaneelandyil Parkum Thavath Kanhayi Biyyathumma and another ... *Respondents* (*Petitioner and Respondent*).

Koonthilot Mayankutti v. Kanhayi Biyyathumma.

Civil Procedure Code, S. 47—Order between parties to suit and in a matter relating to execution—Appealability—O. 22, R 10—Applicability to post decree proceedings—Improvements—Compensation for, awarded by decree—Right to—Person settling with person entitled to such compensation—Right of.

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*A. A. A. O. Nos. 55 and 56 of 1925. 8th February, 1927.

Koonthilot Mayankutti v. Kanhayi Iyyathumma.

The respondent who held a paramba on a mortgage, sued her tenant, the appellant, in ejectment and obtained a decree for possession upon payment of Rs. 835 for improvements. She deposited that sum Meanwhile both the respondent and the appellant were sued by the melcharthdar, and a decree was obtained for possession upon payment of a sum of Rs. 1,200 in respect of the same improvements. As the respondent had already settled with the appellant by the deposit of Rs. 835, she applied (*a*) to have it recorded that she had stepped into the appellant's shoes in respect of the improvements, and (*b*) for payment to her of the Rs. 1,200. The Munsif rejected her application.

Held, that as both the appellant and the respondent were parties to the suit, and the matters arose in execution, the order might be deemed to have been passed under S. 47, C. P. Code, and that an appeal and a second appeal lay from it.

Held further that as the respondent had settled with the appellant by the time the decree in the melcharthdar's suit was passed, and had, by so doing, acquired every interest which the appellant had possessed, the improvements had become hers, and she was entitled to receive payment for them, whatever the amount of that payment turned out to be.

O. 22, R. 10 of Civil Procedure Code is inapplicable to post decree proceedings.

Appeal against the orders of the District Court of North Malabar in C. M. A. No. 12 of 1924 and in A. S. No. 203 of 1924 respectively preferred against the orders of the Court of the Additional District Munsif of Badagara in R. E. A. No. 967 of 1923 in O. S. No. 254 of 1922 and R. E. A. No. 1155 of 1923 in O. S. No. 254 of 1922.

V. P. Karunakaran Nambiar for appellant.

P. S. Narayanaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—These are second appeals from the orders passed by the Additional District Munsif of Badagara in execution of the decree in O. S. No. 254 of 1922 on his file. The respondent who held a paramba upon a mortgage sued her tenant, the appellant, in ejectment in O. S. No. 202 of 1921 and obtained a decree for possession upon payment of Rs. 835 for improvements. She deposited that sum on 11th October, 1923. Meanwhile both the respondent and the appellant were sued by the melcharthdar in the suit first named above, and a decree was obtained on 21st November, 1922 for possession upon payment of a sum of Rs. 1,200 in respect of the same improvements. The difference was due to the adoption of different methods of estimating the value of some of the trees. As the respondent had already settled with the appellant by the deposit of Rs. 835, she applied (*a*) to have it recorded that

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she had stepped into the appellant's shoes in respect of the improvements, and (*b*) for payment to her of the Rs. 1,200. The Additional District Munsif rejected these applications, and it is against their allowance by the District Judge that these further appeals are preferred.

The respondent raises the preliminary objection that no such appeals lie. That would be true if the District Munsif passed his orders under O. 22, R. 10, Civil Procedure Code and the question arises whether that rule applies to proceedings in execution. The learned District Judge has answered this question affirmatively following certain views expressed in *Muthiah Chettiar* v. *Lodd Govinddoss Krishnadoss* (1). That was a Letters Patent Appeal heard by three learned Judges. Two (Wallis, C. J., and Spencer, J.) expressed the opinion that the rule did apply to orders in execution, whereas the third (Kumaraswami Sastri, J.) was of a contrary opinion. The decision of the case, however, it was found, could be rested upon other grounds. In an earlier case, *Sitaramaswami* v. *Lakshmi Narasimha* (2), Seshagiri Aiyar and Napier, JJ., held that proceedings after the termination of the suit are not governed by the rule; but as the learned District Judge points out, that decision was with strict reference to the right of a successor in interest to carry on an appeal, and to such circumstances, the words "during the pendency of a suit" were, it was held, inapplicable. Whether they would have any better application where the suit, strictly so-called, has been closed by a decree, and the only matter which could be described as pending is an unsatisfied decree, appears to me almost equally open to question. In the most recent case brought to my notice, *Srinivasa Aiyangar* v. *Pratapa Simha Rajah Saheb* (3), Devadoss and Waller, JJ., have decided that the rule will not apply to post decree proceedings. I propose to follow this decision for the purposes of this case. Since both the parties to these appeals were parties also to the suit, and the matters arose in execution, it appears to me that the orders may be deemed to have been passed under S. 47, Civil Procedure Code, and therefore that appeals from the learned District Judge's orders are competent.

On the merits, I think that the District Judge was clearly right. The learned vakil who represents the appellant can-

1. (1921) I L R 44 M 919. 41 M L J 316.
2. (1917) I L R 41 M 510. 3. (1925) 49 M L J 704.

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not but accept the statement of the position contained in paragraph 2 of the judgment, viz.:

"When a person who holds a decree which entitles him to recover possession of property on payment of the value of the improvements on it, deposits the value put on the improvements by the decree and takes possession of the property in execution of the decree, he becomes the owner of the improvements, and the person entitled to receive their value from any one who subsequently desires to take possession. The tenant once he has received the value set on his improvements by the decree and has given up possession has no further interest in the improvements."

The further argument addressed to me, and which found acceptance with the District Munsif is that it is inequitable that the respondent, who made none of the improvements, should have profited by the circumstance that they were valued more highly in the second suit than in the first. It may perhaps be a somewhat hard case, although it might very well have happened, so far as appears, that the second estimate fell short of, instead of exceeding, the first. The fact remains, however, that the respondent had settled with the appellant by the time the decree in O. S. No. 254 was passed, and had, by so doing, acquired every interest which the appellant had possessed. The improvements had become hers, and she was entitled to receive payment for them, whatever the amount of that payment turned out to be.

I dismiss the appeals with one set of costs.

A. S. V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE WALLACE.

Maniappa Udayan and others ... *Appellants** (*Defts.*)

v.

Sabapathi Asari and another ... *Respondents* (*Plaintiffs*).

Maniappa Udayan v. Sabapathi Asari

Inam—Land or assessment—Resumption—Order by Collector—Effect—Revenue Board's Standing Orders, O 55 (2) and (3)—Resumption by Government—Grant of patta to another—Effect

The plaintiff sued for recovery of the plaint property, basing his claim on long possession and prescriptive title. The property was originally a service inam and the inam was resumed by the Government by the following order of the Collector "the resumed fields will be fully assessed and the assessment.... paid ... to Urali Asari (that is, the father of the second plaintiff) the senior member of the working incumbents ......Iyan patta

*S. A. No. 825 of 1924. 16th February, 1927.

Manlappa Udayan v. Sabapathi Asari:

should issue in the name of the occupancy owner," and subsequently patta was issued to the defendant.

Held (1) that the fact that the order was passed by the Collector did not show that the inam was of the assessment only, and not of the land, but that the order must be taken to have been passed under O. 55 (2),

(2) that, by the resumption of the land, the Government had the right to instal whom it pleased in the occupancy right of the land and when it granted patta to the defendant the plaintiff's claim to the land based on long possession but short of the prescriptive period of 60 years against Government on that date was put an end to

The meaning of O. 55 (3) of the Revenue Board's Standing Orders is that in ordinary cases the Collector shall assume that the working incumbent is entitled only to the assessment, and that, only if he thinks that the working incumbent ought to have the land also, thus ousting the persons in occupation, he shall report to the Board of Revenue for orders. That is, in a case of inam land, the Collector can resume it and grant the assessment to the working incumbent and the land to the persons in occupation; but if he wishes to oust the persons in occupation and put in the working incumbent he must report the case to the Board of Revenue.

Second Appeal against the decree of the District Court of South Arcot at Cuddalore in A. S. No. 98 of 1923 preferred against the decree of the District Munsif of Kallakurichi in O. S. No. 520 of 1922.

T. M. Krishnaswami Aiyar for appellants.

A. C. Sampath Aiyangar for respondents.

The Court delivered the following

JUDGMENT :—The original suit was for recovery of the plaint property, survey field No. 12|1 measuring about 2¼ acres. The plaintiffs' claim was by virtue of a long possession and prescriptive title, the defendants claim in virtue of a patta issued by Government. Either the land or the assessment of the land constituted a blacksmith inam, but neither the plaintiffs nor the defendants belong to the family of the original holders of the inam. On a decision as to which constituted the inam rests the decision of the case.

The first Court recorded a finding that the inam consisted of the assessment only. The Lower Appellate Court accepted that finding in one part of its judgment, paragraph 4, and in another part, paragraph 3, remarked that 'that the land formed part of the blacksmith inam cannot be denied.' It is argued that in the latter sentence the Lower Appellate Court is using language loosely, but I am not able to accept that argument. The whole of the discussion in paragraph 3 of its judgment is with reference to possession and enjoyment of the land and the conclusion is that plaintiffs and their predecessors were in posses-

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sion and enjoyment of the land for over 12 years prior to suit, having been let into possession because they were doing blacksmith's service for the village so that the enjoyment of the land was by way of remuneration for the service. The reasonable deduction from such a letting into possession would be that the land itself was the inam. The findings of the Lower Appellate Court therefore present some inconsistency on the vital point.

It is argued that the Lower Courts have not decided this issue on evidence, but ignoring the evidence about it have decided it on a pure surmise drawn from a consideration of the Board's Standing Orders. The Lower Appellate Court simply accepts the argument of the trial Court on this point. The trial Court's argument is contained in paragraph 15 of the judgment, and it merely amounts to this, that since the Board's Standing Orders lay down that when Government proposes to resume land which is an inam the order shall be passed not by the Collector but by the Board of Revenue, and that since in this case the Collector passed the order, it must be taken that the Government did not intend to and did not resume the land. The order of resumption is Exhibit V, dated 23rd July, 1919. It is by the Collector and directs that "the resumed fields will be fully assessed and the assessment ......paid......to Urali Asari (that is, the father of the 2nd plaintiff), the senior member of the working incumbents," and that "Iyan patta should issue in the names of the occupancy owners". I think the Lower Courts have misunderstood the Board's Standing Orders by confining their attention to sub-section (3) of O. 55 without considering the sub-section (2). The latter lays down that in a case of inam land being resumed, the Collector has first to resume the land and then may adopt one of the two alternatives, either to direct the assessment to be credited to general revenues or direct that it be paid to the working incumbent. The latter procedure is exactly that which has been adopted in Exhibit V as I read it, and it appears to me clear that the order Exhibit V was passed under this section. It is true that sub-section (3) does set out what is contained in paragraph 15 of the trial Court's judgment; but it obviously means that in ordinary cases the Collector shall assume that the working incumbent is entitled only to the assessment, and that only if he thinks the working incumbent ought to have the land also, thus ousting the persons in occupation, he shall report to the Board of Revenue for orders. That is, in a

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case of inam land the Collector can resume it and grant the assessment to the working incumbent and the land to the persons in occupation; but if he wishes to oust the persons in occupation and put in the working incumbent he must report the case to the Board. It is obvious from Ex. V that the Collector adopted the former procedure as set out in sub-section (2). He gave the assessment to the working incumbent and issued inam patta to the occupancy owners and it appears in fact from Exhibit IV (*a*) that the patta was issued to the defendants as occupancy owners. It appears to me therefore a clear case of resumption of the land and not merely of the assessment and that the Lower Courts have committed a grave error of fact in this respect.

This view is strengthened by a consideration of the fact that both the plaintiffs' witnesses agree that the land is the inam. The 1st plaintiff as P. W. 1 himself says: "The suit land was originally blacksmith Maniyam.... Urali Asari was performing the blacksmith work in the village and as such was in enjoyment of the suit land" and in cross-examination he said: "The blacksmith Maniyam consisted of ⅛th cawnie of nanja and 2½ acres of punja". His evidence is in substance repeated by P. W. 2, 1st defendant as D. W. 1 and D. W.s 2 and 3. It is significant also that in a suit in 1912 (the judgment is filed as Exhibit C), before the date of resumption, against Urali Asari and the 1st plaintiff by the present 1st defendant, the present plaintiff definitely contended that the Civil Court had no jurisdiction because the suit land was unenfranchised blacksmith inam land and raised a definite issue on that point, claiming ancestral mirasi right of doing blacksmith service in the village. The plaintiffs in argument here have sought to explain away that plea as having some reference to the Pensions Act (XXIII of 1871), but I do not see how that affects the categorical nature of the statement that the suit land was inam land. No doubt now the plaintiffs change their song and in paragraph 7 of the plaint say that the *teerwa* on the suit property was originally the remuneration for the blacksmith miras; but then they also say in the plaint that the suit property was for over 70 years in the exclusive possession of the plaintiffs' family. Now the finding of the first Court is and it appears to be perfectly correct that Urali Asari did not come into possession of the land until the death of Annamalai Asari, the last representative of the original blacksmith's family, with whom the plaintiffs had no connection, and that the villagers let Urali Asari and his brother, the

1st plaintiff, into possession because they took up the blacksmith work. This again strengthens the view that the land and not merely the assessment was the remuneration for the service. The Lower Courts have ignored all this positive evidence in the case and have held merely on an erroneous inference from the Board's Standing Orders and Exhibit V that the land is not a remuneration for the service. This fundamental error vitiates their findings and I am not able therefore to accept these findings. I find in reversal of these findings that the suit inam consisted of the land and that it was the land which was resumed by the Collector under Ex. V.

That being so, Government had by the resumption the right to instal whom it pleased in the occupancy right of the land, and a grant of patta to the defendants followed. That *prima facie* put an end to any claim which the plaintiffs had to the occupancy right in the land. The Government at the time of resumption ousted them and entered into possession; any prescriptive title which they may have acquired before the date short of a prescriptive title against Government will not avail them to defeat the right of a party who has been granted patta by Government in pursuance of Government's right to confer the land on resumption on whom it pleases.

This has been laid down by this High Court in several cases by Phillips and Odgers, JJ., in *Ramakrishnayya* v. *Pitchayya* (1), by Devadoss, J., in *Venkata Rao* v. *Manga Rao* (2), by Odgers, J., in S. A. Nos. 287 and 288 of 1921 and myself in *Gourikantam* v. *Ramamurthy* (3) which was confirmed on Letters Patent Appeal. The plaintiffs refer me to *Gunga Gobind Mundul* v. *The Collector of the Twenty-four Pergunnahs* (4), but I do not find that case in point as there it was held that Government had no right to the land but only a right to the assessment; nor was it in a case in which Government had exercised its undoubted right to resume a service inam. Plaintiffs have also pointed out that in S. A. No. 1171 of 1922 in this Court the correctness of a portion of my view in *Gourikantam* v. *Ramamurthy* (3) was doubted. But even in that judgment in the order of reference by Ramesam, J., he lays down that the Privy Council have now held that enfranchisement constitute a fresh grant and that if the Crown takes physical possession and hands it over to a grantee, a long prior possession by a

1. (1925) M W N 480.
2. (1925) M W N 808.
3. (1924) 46 M L J 482.
4. (1867) 11 M I A 345.

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previous occupant short of 60 years will not avail, and the same view was adopted in the judgment itself. Now here there is no doubt, since it is part of the plaintiffs' own case and has been found by the Trial Court and almost goes without saying from the action of the Tahsildar who, in obedience to the Collector's order to issue patta to the occupancy owners, issued patta to the defendants, that plaintiffs' possession had come to an end before or about the time of the resumption, and that the defendants did get into possession in pursuance of the patta issued to them on the resumption. So this judgment also does not avail the plaintiffs.

Plaintiffs have not contended that they perfected a prescriptive title against Government prior to the resumption, nor could they maintain that in face of the finding that they got into possession only on the death of Annamalai Asari some 30 years ago.

I must therefore hold that the plaintiffs have no right to eject the defendants. I reverse the decision of the Lower Courts and dismiss the plaintiffs' suit with costs in all Courts.

N. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE MADHAVAN NAIR.

Kolluri Lakshminarayana ... *Appellant** (*Defendant*)

v.

Kambhampati Lakshmipathi and another ... *Respondents* (*Plaintiffs*).

Lakshminarayana v. Lakshmipathi.

Limitation Act, S. 15—Pronote by defendant to plaintiff's father—Suit by plaintiff's father's sister on the note on ground that she was entitled to the amount—Decree by first Court—Reversal by Appellate Court—Renewal of pronote by another pronote—Suit on renewed pronote by plaintiff—Cause of action if suspended during pendency of the prior litigation

The defendant executed a promissory note on 3rd April, 1914 in favour of the plaintiff's father. He executed another promissory note on 4th February, 1917 in renewal of the prior note. The plaintiff's father's sister filed a suit in 1917 on the promissory note dated 3rd April, 1914 alleging that the note had been nominally taken in plaintiff's father's name with her money and that she was entitled to the amount due on it. The District Munsif passed a decree in her favour in 1919 declaring her right and directing the present plaintiffs who were the 2nd and 3rd defendants in that suit to endorse the promissory note in her favour. There was an appeal and the Subordinate Judge on the 13th October, 1919 reversed the

*S. A. No. 770 of 1924. 31st March, 1927.

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decision of the District Munsif and dismissed the suit. On the 26th June, 1919 the defendant acknowledged his liability in respect of the renewed promissory note On 11th October, 1922 the present suit was brought on the renewed promissory note dated 4th February, 1917.

Held, that the effect of the decision of the District Munsif in the prior suit by the plaintiff's father's sister was that the plaintiffs in the present suit who were defendants 2 and 3 in that suit had no right to recover the money due on the first promissory note and the decision was in substance one which prevented the plaintiffs from filing a suit, and that therefore the present suit was not barred by limitation.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Cocanada in Appeal Suit No. 56 of 1923 preferred against the decree of the Court of the District Munsif of Peddapur in O. S. No. 411 of 1922.

P. Somasundaram for appellant.

G. Lakshmanna for respondents.

The Court delivered the following

JUDGMENT :—Defendant is the appellant. The suit was on a promissory note dated the 4th of February, 1917 which was executed in renewal of a prior promissory note dated the 3rd of April, 1914, executed by the defendant in favour of the plaintiffs' father. The present suit was filed on the 11th of October, 1922. The plaintiff's father's sister filed O. S. No. 205 of 1917 on the promissory note dated the 3rd of April 1914. Her case was that the note was nominally taken in plaintiffs' father's name, with her money and that she is entitled to the amount due on the promissory note. The District Munsif passed a decree in her favour in 1919. The decree declared her right and directed the present plaintiffs who were the 2nd and 3rd defendants in that suit to endorse the promissory note in her favour. There was an appeal and the Subordinate Judge on the 13th of October, 1919 reversed the decision of the District Munsif and dismissed the plaintiffs' suit. Both the present plaintiffs and the defendant were parties to O. S. No. 205 of 1917. On the 26th of June, 1919 the 1st defendant in O. S. No. 205 of 1917 who is the appellant here filed a petition Ex. D where he has acknowledged his liability in respect of the renewed promissory note. He also acknowledged his liability in his written statement in that suit. The District Munsif held that the present suit was barred by limitation but the Subordinate Judge reversed the decree.

The only question argued before us is whether the present suit is barred by limitation. It is argued by Mr. Somasundaram for the appellant that there is no acknowledgment in

Lakshmi-narayana v. Lakshmi-pathi.

Ex. D, that S. 15 can have no application and that owing to the renewal of the promissory note of the 3rd of April, 1914 on the 4th of February, 1917 there was nothing to prevent the plaintiffs from filing a suit on the renewed promissory note which was not the subject-matter of the previous suit. It is contended by Mr. Lakshmanna that so far as the second note is concerned, as it is only a renewal of the first note, there is no fresh consideration, that the right to recover the money on the second note would simply follow the result of the adjudication in O. S. No. 205 of 1917, that by virtue of S. 19 the acknowledgment in Ex. D gives a fresh starting point for limitation from the 26th of June 1919, and the plaintiffs will be in time till the 26th of June, 1922, that in the previous suit the parties were *bona fide* litigating their title as regards the amount due on the first promissory note, that from the date of that suit till the reversal of the decree by the Subordinate Judge on the 13th of October 1919, the plaintiffs could not file a suit on the second promissory note and that if that period is excluded, they will be in time.

It is clear that if S. 15 applies, the suit would be in time. We are of opinion that the effect of the decision of the District Munsif in O. S. No. 205 of 1917 was that the present plaintiffs had no right to recover the money due on the first promissory note and as they were directed to endorse that note to the plaintiff in that suit it is difficult to see how they could, when that decree was enforced, claim any money on the renewed promissory note till the decision of the District Munsif was reversed in appeal. The fact that they were defendants in that suit makes no difference. The question is whether the order or decree in a previous litigation between the same parties is in substance one which prevents a party from filing a suit or executing a decree.

In *Pandey Satdeo Narayan* v. *Srimati Radhey Kura* (1) the question was whether an order staying execution on security being given will in cases where a person is unable to give security bring the case within S. 15 of the Limitation Act. Sir Dawson Miller, C. J., held that it would and observed:—

"In my opinion it is essential to look at the real effect of the order and not merely at the form. The effect in the present case was undoubtedly to stay the execution of the decree unless a condition impossible of performance were complied with by the decree-holder."

1. (1919) 5 Pat. L. J 39.

Lakshminarayana v. Lakshmipathi.

In *Satish Mohini Debya* v. *Pabna Bank, Ltd.* (2) the learned Judges Fletcher and Sir Syed Shamsul Huda, JJ., looked into the substance of the order and not the mere form and held that so long as the decree could not be executed till another litigation was disposed of, S. 15 applied.

Applying that principle to the facts of the present case we think that the suit is not barred by limitation.

It is unnecessary to consider the other question raised by Mr. Lakshmanna as to whether the payment into Court of the amount of the decree in the previous litigation discharged the decree under the provisions of O. 21, R. 2, C. P. Code and gave the present plaintiffs a fresh cause of action when the decree of the District Munsif was set aside by the Subordinate Judge on the 13th of October, 1919.

In the result the second appeal fails and is dismissed with costs.

N. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

Muhammad Amirkhan and others ... *Petitioners* (Counter-petrs.)*

v.

Mahalingam Pillai and others ... *Respondents (Petitioners).*

Muhammad Amirkhan v. Mahalingam Pillai.

Criminal Procedure Code, S. 147—"Land"—Public street if included in—Order under S 147—Form of

The expression "land or water", as used in S. 147 of the Code of Criminal Procedure, is not confined to private property, though it is so confined in Sub-section (1) of S. 145

Where the question was whether the Hindu community were entitled to use a public street, such user being resisted by the Muhammadans who lived in that locality,

Held, that S. 147, Criminal Procedure Code, had application to such a case.

Where, in a case in which it was found both generally that the Hindus used a public street and particularly that they had taken a particular procession during the previous season,

Held, that an order allowing them to pass through the street with the procession in question, and prohibiting the Muhammadans from interfering in any manner with the use of the Hindus of the street, was legally competent under S. 147.

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*Cr R. C. No. 890 of 1926. 26th April, 1927.
(Cr. R. P. No. 771 of 1926).

2. (1918) 47 I C 907.

Muhammad Amirkhan v. Mahalingam Pillai.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order dated the 22nd October, 1926 of the Court of the District Magistrate of Ramnad in C. M. P. No. 88 of 1926 (Mis. Case No. 32 of 1926 on the file of the Court of the Sub-divisional Magistrate of Ramnad).

F. S. Vas for petitioners.

The Public Prosecutor for the Crown.

V. L. Ethiraj and *P. Somasundaram* for respondents.

The Court made the following

ORDER:—This is a Criminal Revision Petition arising out of proceedings taken under S. 147 of the Code of Criminal Procedure in which the question which arose was whether the Hindu community were entitled to use a certain street, such user being resisted by the Muhammadans who live in that locality. The learned Sub-divisional Magistrate found that the street was a public one, and the first question raised is whether S. 147 of the Code of Criminal Procedure has application in such circumstances. There is very little case-law upon this subject. In *Kolandai Nayakan* v. *Karabudda Savudri* (1), which was under the old Code, application of the corresponding section was considered to be open to question. In *Sudalaimuthu Chettiar* v. *Enan Samban* (2) and *Karuppanna Goundan* v. *Kandaswami Goundan* (3), on the other hand, it was held that there was nothing in the language of the section which precluded its application to similar circumstances. *In re Narayana* (4) related to S. 532 of the Code of 1872, which was drafted in quite different terms, and the decision therefore affords no guide. I do not find anything in the section as now amended by the Code of 1923 to render the two decisions which I have referred to inapplicable. The Magistrate has to satisfy himself that there exists "a dispute likely to cause a breach of the peace regarding any alleged right to user of any land or water as explained in S. 145, sub-section (2) whether such right is claimed as easement or otherwise." Sub-section (2) of S. 145 merely lays down that the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land and rents or profits of any such property. That does not in my view make the expression "land or water," as used in S. 147, necessarily refer only to private property though of

1. (1896) 6 M L J 193. 2. (1915) 31 I C 367.
3. (1914) 26 M L J 233. 4. (1883) I L R 7 M 49.

Muhammad Amirkhan v. Mahalingam Pillai.

course it does necessarily so refer in sub-section (1) of S. 145. The learned Counsel for the petitioners has advanced certain other arguments with the design of showing that the section is not appropriately worded for such a case as this, but after giving them due weight I do not feel disposed to differ from the view that has previously been taken by this Court. I think therefore that the Sub-divisional Magistrate was not wrong in having recourse to this section.

It is then said that he did not satisfy himself that a breach of the peace was threatened, but, I think, it is clear from several passages in his order that he had this probable risk in view throughout, and although at one stage the parties entered into a compromise yet the Hindus immediately resiled from it and that circumstance certainly does not show that the danger of such a breach was absent. The actual directions, which the Court gave, are contained in paragraphs 23 and 24 of its order where the Magistrate says that the Hindus must be allowed to pass through the street with Mulapari, which refers to the particular case of the procession which they wished to take and, more generally in paragraph 24, that the Muhammadans are prohibited from interfering in any manner with the use of the Hindus of the street. It appears to me that this is an order which can be legally passed under S. 147. That section contains a proviso that the right asserted must have been previously exercised, and the Court appears to me to have found both generally that the Hindus used the street and particularly that they had taken the procession during the previous season. The order seems to me to amount to no more than a finding that the street is a public one and a declaration of the ordinary legal rights of the Hindus as members of the public. This order was taken up in revision to the District Magistrate and he refused to interfere with it. I agree with his view and accordingly dismiss this petition.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

Suppan Chetti and others ... *Petitioners* (Accused).*

Suppan Chetti, *In re.*

Village Magistrate acting without a Panchayat—Criminal case—Imprisonment—Sentence of—Legality—Regulation II of 1816—*S* 10—*Effect—Imprisonment in village common—Legality of—Rules ordinary relating to—Conduct of criminal cases—Inapplicability to proceedings under Regulation II of* 1816.

Act I of 1899 as amended by Act II of 1920 is inapplicable to the conduct of criminal cases by Village Munsifs or Village Magistrates sitting without a Panchayat. Regulation II of 1816 is the enactment applicable to such a case, and under it a Village Magistrate has power to inflict imprisonment. Under that Regulation the imprisonment must be either in the village choultry or nowhere at all, and a sentence of imprisonment in the village common, because there is no village choultry available, is illegal.

A Court acting in accordance with Regulation II of 1816 is not required to adopt the ordinary rules relating to conduct of criminal cases, so long as it observes the fundamental dictates of justice, equity and good conscience. If the Village Magistrate refused to allow the accused to put any questions there might be ground for interference.

Petition under S. 107 of the Government of India Act praying the High Court to revise the judgment of the Court of the Village Magistrate, Panrimalai, Dindigul, in Case No. 4 of 1926.

S. Nagaraja Aiyar for petitioners.

The Public Prosecutor for the Crown.

The Court made the following

ORDER :—The petitioners in this case were convicted by the Village Magistrate of Panrimalai, Dindigul Taluk, of an offence of assault and were sentenced to simple imprisonment in the village common from 1 P. M. to 3 P. M. on the date on which the conviction was passed. The first point raised is that a Village Magistrate proceeds under Act I of 1899 as amended by Act II of 1920, and S. 76 of that Act gives power to fine but not to imprison. S. 76, however, relates only to the procedure of a Panchayat Court and it is clear from S. 75 that a Village Court may be either a Panchayat Court or the Court of a Village Munsif, S. 7 enabling the Collector in villages where there are no Panchayat Courts to appoint Village Munsifs for this purpose. So far as I have been shown, the Act contains no provision for the conduct of criminal cases by Village Munsifs or Village Magistrates sitting with-

*Cr. R. C No. 870 of 1926. 26th April, 1927.
(Cr. R. P. No. 752 of 1926.)

Suppan Chetti, *In re.*

out a Panchayat. For this, we have to turn to Regulation II of 1816, S. 10, which authorises a Village Magistrate to sentence a person for certain offences to confinement in the village choultry for a period not exceeding 12 hours. It is clear therefore that the Court in this case had power to inflict imprisonment in the village choultry. The order, however, shows that the imprisonment was made in the village common, presumably because there was no village choultry available. As has been held in *In re Ponnusami Pillai* (1) such a sentence of imprisonment is illegal and it must be either in the choultry or nowhere at all. Following that decision I must set aside the sentence. In the circumstances I do not consider it necessary to pass any sentence in substitution.

The only other point urged has to do with the procedure of the Village Magistrate in trying the case. There is a record of the statements of the witnesses, and so far as can be gathered from them they were not cross-examined by the accused. In the first place it is not clear that the record is complete, and secondly, a Village Magistrate acting under the Regulation is not required to do more than conduct a verbal examination and to record his decision. It is entirely contrary to the spirit of the Regulation that a Court acting in accordance with it should be required to adopt the ordinary rules relating to conduct of criminal cases, so long as it observes the fundamental dictates of justice, equity and good conscience. The learned Public Prosecutor has drawn my attention to G. O. No. 283, Judicial, dated 25th February 1909, which lays down that the conduct of proceedings in Village Courts should be "untrammelled by any special procedure, the weight of their authority being virtually dependent upon the fact that they sit *coram populo,* and that their verdicts are supported by the common knowledge of the villagers". With this expression of opinion I find myself in complete agreement and it was certainly never intended that the procedure of a Village Magistrate should be open to such criticisms as would be appropriate in the case of higher courts. No doubt if the Village Magistrate had refused to allow the accused to put any questions there might be ground for interference, but I have not been satisfied that he took such a course here.

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1. (1920) 12 L W 638.

Suppan Chetti, *In re.*

With the modification indicated above, I dismiss this criminal revision petition.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

Nachiappa Udayan *alias* Venga Udayan and others ... *Petitioners** (*Accused* 1 *to* 4).

Nachiappa Udayan, *In re.*

Revision—Criminal part-heard case in Court below—Interference with—Single trial directed by Court below—Legality of—Question in revision as to.

The High Court will not, except upon allegations of the gravest departure from procedure, interfere in revision with a part-heard criminal case and say whether or not the trial Court was exercising its powers rightly in holding a single trial.

Quaere : Whether the High Court will, under any circumstances, interfere at such a stage in revision ?

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the charge framed by the First Class Sub-divisional Magistrate, Salem, in C. C. No. 24 of 1926, dated 14th October, 1926, and to direct stay of further proceedings therein pending disposal of this petition.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for petitioners.

The Public Prosecutor for the Crown.

The Court made the following

ORDER :—The petitioner wishes this Court to intervene in the course of this part-heard case and say that the Trial Court is wrong in holding that all the acts imputed to the accused cannot (can ?) be brought within a single transaction, as that term is used in S. 239 of the Code of Cri. Procedure. The case is one of rioting and other offences, and it can hardly be doubted that in such circumstances a single trial and charge may comprehend many diverse acts committed over a considerable space of time, if there be ground to believe that they were the result of a common object. The objection to this Court endeavouring, in the midst of such a trial, to ascertain whether or not the Lower Court is exercising its powers rightly in holding a single trial, seems to me to be so manifest as scarcely to need stating. I do not go so far as to say that in no circumstances can a High

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*Cr. R. C. No. 931 of 1926. 27th April, 1927.
(Cr. R. P. No. 805 of 1926.)

Court interfere at such a stage in revision, but I think that the learned Judges who respectively decided *Kuppuswami Aiyar, In re* (1) and *Ramanathan Chettiar* v. *Sivarama Subramania Aiyar* (2), and the former of whom says that such power should be exercised with great care, would agree with me that only upon allegations of the gravest departure from procedure should this Court take the conduct of a case of this description before its termination out of the hands of the Trial Court. On the materials which the petitioner has made available, I am wholly unable to satisfy myself that such an irregularity has been committed. There appears to be evidence that the four petitioners cut a fence, which, without more, may well have constituted the "force or violence" necessary, with other ingredients, to amount to rioting. [See *Samaruddi* v. *Emperor* (3).] As to this, of course, I can express no opinion. The only view I can take is that in the interests of justice it is necessary for the trial to terminate before these questions are investigated; and if substance is found in them the petitioners will have a sufficient remedy then. The Criminal Revision Petition is dismissed.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Balantrapur Venkatarao ... *Petitioner* in all Cr. R. Cs.* (*Complainant in all*)

v.

Valluri Padmanabha Raju and others ... *Respondents in Cr. R. C. Nos.* 916, 917, 918 *and* 919 *of* 1926 (*Accused*).

Copyright Act (III of 1914), *S* 7—*Infringement of copyright—Prosecution for—Right of author of—Payment of Rs* 2 *under Act (XX of* 1847) —*Failure as regards—Effect—Ss.* 5 *and* 14, *proviso of Act (XX of* 1847)—*Effect of—Acquittal—Setting aside in revision of—Conditions.*

The mere failure of an author to make the payment prescribed by S. 5 of Act (XX of 1847) does not deprive him of his copyright in his book On the other hand, the proviso to S 14 of that Act definitely states the contrary. It is only the right to sue under that Act that is prohibited if the registration fee has not been paid. The procedure about payment of fees prescribed by Act (XX of 1847) has no place in the present Act (III of 1914),

*Cr. R. C. Nos. 916 to 919 of 1926. 27th July, 1927.
(Cr. R. P. Nos. 792 to 795 of 1926).

1. (1915) I L R 39 M 561 : 28 M L J 505.
2. (1924) 47 M L J 373.
3. (1912) I L R 40 C. 367.

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and therefore a complaint under S. 7 of the new Act cannot be thrown out on the ground that the complainant has not paid the Rs 2 which he would have had to pay had Act (XX of 1847) still remained in force.

An acquittal will be set aside in revision in a case where the Court below has proceeded on a wrong view of the law, and where the matter is of great importance to the complainant in his position as author of a book, which, if the acquittal stands, will be pirated by the accused who will secure for himself the gains that ought legitimately to go to the complainant.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Court of the Joint Magistrate of Rajahmundry in Calendar Cases Nos. 27, 28, 29 and 30 of 1926 respectively.

Ch. Raghava Rao for petitioner.

V. Govindarajachari and *K. L. Narasimha Rao* for respondents.

The Public Prosecutor for the Crown.

The Court delivered the following

JUDGMENT :—These are petitions presented against orders of acquittal of the counter-petitioners in the matter of offences under S. 7 of the Copyright Act (III of 1914) on the ground that the Lower Court has erred seriously in its view of the law.

The facts necessary for the disposal of these cases are that the petitioner published in 1906 and 1908 in two parts a book of Folklore Stories in Telugu containing in all 64 tales. So far as appears, the collection and form of presentation of these tales and the language in which they were told was original. In 1914 he published a Second Edition which was to all intents and purposes a reprint of the first. In 1925 the counter-petitioners published and sold the same set of tales in almost the same language and order. The petitioner contended before the Lower Court that they had thereby committed offences under S. 7 of the Copyright Act, having infringed his copyright book. The counter-petitioners' defence was that the book published and sold by them was a reprint of a book by one Ranganatha Rao and that they were not aware of the petitioner's book or whether Ranganatha Rao's book was or was not an infringement of the petitioner's copyright. It was also contended that the petitioner had no copyright whatever left in his book, first, because it was not original, and second, because he had not paid the registration fee.

Now on the first point that Court has not come to any very definite conclusion, but I gather that it was of opinion that the petitioner's book was an original compilation and therefore

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prima facie it was a work in which the petitioner possessed copyright. On the second point the Lower Court has agreed with the counter-petitioners' argument, and that finding is attacked here. The ground on which the finding is based is that, when the first edition of the work was published, the Copyright Act in force was Act XX of 1847, which was to some extent modified or enlarged by Act XXV of 1867. Under the latter Act, S. 18, a payment of Rs. 2 was necessary to constitute entry in the Government Catalogue of Books as entry for the purpose of copyright under Act XX of 1847. Under S. 5 of this latter Act the proprietor of a copyright may have his book registered in the Registry Book for a sum of Rs. 2 and under S. 14 of that Act, "No proprietor of copyright shall maintain, under the provisions of this Act, any action or suit at law or in equity, or any summary proceeding in respect of infringement of such copyright, unless he shall, before commencing such action, suit or proceeding, have caused an entry to be made in the book of registry : provided always that the omission to make such entry shall not affect the copyright in any book, nor the right to sue or proceed in respect of the infringement thereof, except the right to sue or proceed in respect of the infringement thereof, under the provisions of this Act." It seems perfectly clear from this proviso that it applies only to actions taken under the provisions of that Act. That Act was repealed by Act III of 1914, and the present action was not taken under the provisions of Act XX of 1847 but under the present Act. I am therefore unable to see how the Lower Court has come to the conclusion that the present action is not maintainable because the petitioner has not paid the Rs. 2 which he would have had to pay had Act XX of 1847 still been in force.

This view is the view adopted in a case under the English Copyright Act reported in *Goubaud and another* v. *Wallace* (1). The counter-petitioners referred me to a case *Evans and another* v. *Morris* (2) but no reasons are set out in the notes in that case. In a case *E. W. Savory, Ltd.* v. *The World of Golf, Ltd.* (3) under the allied Fine Arts Copyright Act the view is expressed that mere failure to register does not deprive an artist of his copyright. This appears to me to be a correct and reasonable view. The Lower Court seems to think that failure to make the payment deprives petitioner of his copyright altogether. I should be surprised if the Legislature had laid down any such

1. (1877) 36 L T 704. 2. (1913) W N 58 sh. n. 3. (1914) 2 Ch 566.

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proposition and in fact the proviso to S. 14 of Act XX of 1847 definitely states the contrary. It is only the right to sue under that Act that is prohibited if the registration fee has not been paid.

The Lower Court has therefore proceeded on a fundamental misconception of the law. This procedure about payment of fees has no place in the present Act, and therefore the only question the Lower Court had to consider was whether the counter-petitioners had committed an offence under S. 7 of that Act. Under that Act the petitioner's copyright, which, the Lower Court *prima facie* found to exist in him, will still subsist since it enures at least for his life-time. So the real question for the Lower Court was whether counter-petitioners had knowingly made for sale and sold infringing copies. There are two points here to be decided, on neither of which has the Lower Court given any definite pronouncement; first, whether the petitioner's copyright book has been infringed by the counter-petitioners; and secondly, if so, did the counter-petitioners infringe it knowingly. The Lower Court's judgment is vitiated throughout by its mistake of law from which it concludes that petitioner's copyright no longer subsists and therefore the counter-petitioners have not committed any offence. The cases, therefore, have not been fairly heard and tried.

It is urged that there is no sufficient ground for setting aside an acquittal. But in a case where the Court has proceeded on a wrong view of the law, and where the matter is, as no doubt it is, of great importance to the petitioner in his position as author of this book, which, if this judgment stands, will be pirated by another who will secure for himself the gains that ought legitimately to go to the petitioner, I think it necessary that there should be a fresh trial. I therefore order a re-trial. In this re-trial the matter of confiscating the copies will also be re-opened since the whole case is now re-opened. The Lower Court in refusing to confiscate these copies has rested its order on its erroneous view that the petitioner no longer possessed any copyright which, as I have said, cannot be supported. All the four cases are, therefore, directed to be sent back for re-trial. I reverse the decisions in all the four cases, and direct a re-trial by the Joint Magistrate of Rajahmundry.

A. S. V. *Re-trial ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE CURGENVEN.

R. D. K. Venkatalingama Nayanim Bahadur Varu, Rajah of Kalahasti ... *Appellant* (30th Counter-petitioner)*

v.

Rao Muni Venkatadri Rao Garu ... *Respondent (Plff.)*.

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Civil Procedure Code (1908), *O* 21. *R* 2—*Adjustment of decree—Agreement to adjust—Distinction—Agreement to adjust not certified—Validity—Oral agreement modifying decree—Proof of—Permissibility—Evidence Act, S.* 92—*Applicability to decrees and to agreements between decree-holder and judgment-debtor—Executing Court—Validity of decree—Jurisdiction to question—Statute enacted in public interest—Decree passed in violation of—Madras Impartible Estates Act, S.* 6—*Debt of deceased Zamindar—Decree making estate liable in hands of successor for—Consent in writing of Collector—Absence of—Invalidity of decree on ground of—Jurisdiction of executing Court to consider—Executability of decree in such a case.*

In a case in which a decree was made against the assets of the first defendant in the hands of the 30th defendant and against various others of the defendants, making them jointly and severally liable for a certain sum, the 30th defendant pleaded in bar of execution an oral agreement between him and the decree-holder that the latter would not proceed against the former beyond the extent of the estate still in his possession.

Held, that the agreement did not amount to an adjustment of a portion of the decretal amount, but was a mere agreement to adjust, which fell short of an adjustment, and, not being certified under O. 21, R. 2, C. P. Code, it could not avail the judgment-debtor.

Held further, that the agreement being an oral one varying the terms of the decree, S. 92 of the Evidence Act precluded proof thereof.

S. 92 of the Evidence Act is not confined to "dispositive" instruments, but applies to decrees also and to oral agreements between a decree-holder and a judgment-debtor.

The general rule that an executing Court cannot inquire into the validity of the decree does not apply to a case in which the execution of the decree would involve the infraction of a provision of law enacted in the public interest. It is the duty of the Court, however and whenever such a consequence becomes apparent to it, to stay its hand. It is, of course, otherwise when the provision of the law is designed to protect the interests only of the class of persons to whom the judgment-debtor belongs, so that it may be dispensed with without infringing any public right or public policy.

The object of the Madras Impartible Estates Act of 1904 is the preservation of the estates included in the Schedule to it in the hands of

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*A. A. O. No. 556 of 1925. 12th April, 1927.

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successive heirs as a measure of public policy. The right of a person to reimbursement of arrears of land revenue paid by him on behalf of a Zamindar becomes a debt due to him from the Zamindar within the meaning of S. 6 of that Act; and for such a debt, the estate cannot. after the death of the Zamindar, be proceeded against in the hands of the successor without the consent in writing of the Collector. The fact that a final decree making the estate liable for such a debt in the hands of the successor has been passed without objection or even by consent, in the absence of the Collector's consent in writing, is no bar to the executing Court holding, at the instance of the successor, the decree invalid and unexecutable as against the estate.

Appeal against the order of the Court of the Subordinate Judge of Chittoor, dated 25th July, 1925 and made in E. P. No. 41 of 1924 in O. S. No. 103 of 1916.

L. A. Govindaraghava Aiyar and *A. Ramachandra Aiyar* for appellant.

P. Venkataramana Rao for respondent.

The Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—This is an appeal against the order of the Subordinate Judge of Chittoor ordering an execution to proceed. The appellant is the 30th defendant in the case. The 1st defendant died and the 30th defendant was brought in as the legal representative of the 1st defendant, the Rajah of Kalahasti. The suit was to recover money paid by the plaintiff on behalf of the defendants for cess, peishcush, etc. The plaintiff owns two villages in the zamindari and obtained a decree in the suit which makes the defendants jointly and severally liable, and not only directs recovery by the sale of the assets of the late 1st defendant in the hands of the 30th defendant but it is also said that in a portion of the decree, not printed, certain villages now held by the 30th defendant are ordered to be sold to satisfy the decree. The first thing to be noticed is that there has been no appeal and the reason that is given to us for that is this. 30th defendant wanted to appeal, but the plaintiff assured him orally that proceedings would be taken against him only in respect of his proportionate liability. So the question has arisen whether this is an adjustment of the decree out of Court under O. 21, R. 2, and further whether the oral agreement is inconsistent with the decree. A further point is raised by Mr. L. A. Govindaraghava Aiyar for the appellant, and that is, that under the Impartible Estates Act (and it is not disputed, the estate of the 30th defendant is such an estate) it cannot be sold without the consent of the Collector and that the decree in so far as it asks for such a sale is void.

The 30th defendant put in a defence in his character as legal representative and contended that he was not personally responsible, that he had succeeded to the impartible estate, that the plaintiff was not entitled to the first charge on the villages in the B Schedule or the jodi right of agraharam in C Schedule, that the liability of the 1st defendant to the plaintiff for non-payment of peishcush is one which cannot be enforced against this defendant or against any portion of the estate of Kalahasti which may have devolved on him by succession. The 9th issue raises the question which of the defendants, if any, and to what extent they, are liable, and whether the defendants or any of them are personally liable. The Subordinate Judge found that the plaintiff was entitled to recover from the 30th defendant the decretal amount from the assets of the 1st defendant in his hands and as the peishcush is the first charge on the zamindari the plaintiff was entitled to enforce this charge against the villages in the possession of the 30th defendant and on his jodi right over the villages in the plaint C Schedule and the villages in A, B and D Schedules which have not been separately registered and the proportionate peishcush unascertained.

On the matter coming before the Subordinate Judge he decided that it was not a plea of adjustment under O. 21, R. 2 and that if it were, it would be barred by the limitation of 90 days. The Subordinate Judge, however, based his finding on his view that an agreement of this sort cannot be proved as it is not only contrary to the provisions of S. 92 of the Evidence Act but against the policy of the Civil Procedure Code. Any order for adjustment to be valid must comply with the requirements of O. 21, R. 2; that is to say, the decree-holder must certify the adjustment and the same must be recorded by the Court. If it has not been certified or recorded as aforesaid, it shall not be recognised by any Court executing the decree. Whether or not there has been an adjustment here within the meaning of the rule, it is perfectly clear that it has not been certified to the Court. The learned vakil for the appellant urges that the case ought to be sent down to the Subordinate Judge to find as to the truth or otherwise of the fact of the adjustment. Adjustment is said in *Venkataswami* v. *Kotilingam* (1) to be some method of settling the decree which is not provided for in the decree itself. If the decree-holder can still execute the decree in spite of the adjustment, then there has been no adjustment at

1. (1925) 49 M L J 730.

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all. Much stress is laid on the case reported in *Debendra Narain Sinha* v. *Sourindra Mohan Sinha* (2), a case of the Calcutta High Court, and *Ananda Priya Baishnavi* v. *Bijoy Krishna Ray* (3) simply follows it, where the learned Judges held that S. 92 of the Evidence Act does not apply to decrees and therefore oral evidence may be admissible in proof of an alleged oral agreement between the decree-holder and a judgment-debtor. This is based on the assumption that the words "as between the parties to any such instrument or their representatives in interest" are to be read along with the words "contract, grant or disposition of property" and also along with the words "or any other matter required by law to be reduced to the form of a document". On this assumption the learned Judges proceed to hold that the object of the Legislature was to deal with only two classes of cases, namely, first, contracts, etc., reduced to writing by the act of parties as mentioned in S. 91, and secondly, contracts, etc., required by law to be reduced to the form of writing; in other words, the expression "any matter required by law to be reduced to the form of a document" is controlled by the expression "as between the parties to any such instrument or their representatives in interest" and has in S. 92 a much narrower scope than in S. 91. This case though not quoted was obviously before two other Judges of the same High Court in *Ananda Priya Baishnavi* v *Bijoy Krishna Ray* (3) and was followed. It is to the same effect, *i.e.*, that S. 92 of the Evidence Act only refers to "dispositive" documents, in other words, the words "any other matter required by law to be reduced to the form of a document are *ejusdem generis* with contracts, grants or dispositions of property". The case in *Debendra Narain Sinha* v. *Sourindra Mohan Sinha* (2) has been disapproved by Napier and Krishnan, JJ., in S. A. No. 62 of 1920. They agree in saying that there is no warrant for the narrow construction placed on the material words by the Calcutta High Court, and, if I may say so, I respectfully agree with their opinion. In *Lachman Das* v. *Baba Ramnath Kalikamliwala* (4) the judgment-debtor alleged an oral agreement and the decree-holder denied such an adjustment taking place. Both the Judges held that such an agreement as alleged could not be set up under O. 21, R. 2 as a bar to execution and one of the learned Judges, Walsh, J., also held that under S. 92 of the Evidence Act it could not be set up as it was clearly a

2. (1914) 24 I C 391. 3. (1925) 91 I C 705.
4. (1921) I L R 44 A 258.

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new agreement contradicting or varying the terms of the original decree.

Further it was contended by Mr. L. A. Govindaraghava Aiyar that under O. 21, R. 2 there must be an actual payment in order to be an adjustment and not a promise. He quotes *Lodd Govindoss* v. *Ramdoss* (5) for that proposition where the learned Judges held that an adjustment extinguishes the decree either in whole or in part and that a transaction by which the parties do vary the mode in which the reliefs granted by the decree are to be realised in execution is not an adjustment of a decree but it is an attempt to vary the terms of the decree. Such a variation is against the policy of the Civil Procedure Code and cannot be allowed as it is an attempt by the parties to alter the decree by methods which are not those recognised by way of review or appeal by the Code. It seems to me that this is enough to dispose of the first two points.

The third point is that even in execution the executing Court ought to have held that the decree is void in so far as it seeks to render liable the impartible properties of the 30th defendant. The preliminary decree in this suit was passed on the 30th September, 1920 and the final decree on the 27th July, 1922. There was no appeal against the preliminary decree and this point was never even taken in the executing Court before the Subordinate Judge. It is taken here in an appeal from an executing Court for the first time. But the question turns on whether S. 6 of Act II of 1904 contains an absolute prohibition against the alienation of this impartible estate such as to render it incapable of being bound by the decree of the late Rajah. It was held in *Venkatalingama* v. *Arunachellam Chettiar* (6) by Krishnan, J., and myself that no portion of the estate in the hands of the son could be made liable for a decree which had been passed against the late holder of the estate for misappropriating certain moneys that belonged to a temple. The policy of this Act is stated to be the preservation of the property in the family of the Zamindar who is practically for the time being in the position of a life-estate holder with powers of dealing with the estate under certain contingencies. I was at first inclined to think that the circumstances of this case, namely, the land itself being made liable for the Government revenue, would take it out of the line of cases where the land has been held, as in *Venkatalingama* v. *Arunachellam Chettiar's* (6) case, to be inalienable for what may be called the private

5. (1915) M W N 225. 6. (1923) 19 L W 132.

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debts or defaults of the holder. There is, however, a line of cases which hold that, although the ordinary rule may be that you cannot go behind a decree in the executing Court, still, if there is a prohibition enacted by the Legislature on considerations of public policy, that prohibition is absolute and must be given effect to when the executing Court has it brought to its notice. For instance, in *Raja of Vizianagaram* v. *Dantivada Chelliah* (7) (Subramania Aiyar and Sankaran Nair, JJ.) it was held that a decree directing the sale of lands prohibited from being attached and sold by S. 5 of the Madras Hereditary Village Offices Act is *ultra vires*. As the learned Judges point out there, if the interdiction upon alienation by parties or attachment or sale by the Court were merely for the benefit of private persons, they can waive the benefit introduced in their favour. But where the prohibition has some object of public policy in view, the rule is that the prohibition must be enforced literally and strictly, and in these circumstances it must be taken to be absolute and to deprive Civil Courts of all jurisdiction to give a direction for sale of such property in question. So again in *Mayan Pathuti* v. *Pakuran* (8) (Subramania Aiyar and Davies, JJ.). That was a sale in contravention of S. 99 of the Transfer of Property Act, and Subramania Aiyar, J., points out that, if you could say that the section was enacted for the protection of public interests and the law was to be regarded as laying down a rule of general policy rendering the prohibition absolute, the sale would be void. If, on the other hand, it were introduced simply for the benefit of a particular class of persons, the sale would only be voidable. Further again in *Rangaswami Naicker* v. *Thirupati Naicker* (9) it was observed that, if a decree is passed by a Civil Court which had absolutely no jurisdiction to pass it, the party to the proceeding may impeach it as a nullity though it has not been set aside in an appeal or otherwise. So also in *Lakshmi Bibi Kujrani* v. *Atal Bihary Haldar* (10), a sale in contravention of the provisions of Chota Nagpur Tenancy Act and in *Katwari* v. *Sita Ram Tiwari* (11), a sale in contravention of S. 20 of the Agra Tenancy Act. Finally, Wallace and Jackson, JJ., in L. P. A. No. 37 of 1927 have, I understand, decided, in considering the Full Bench ruling in

7. (1904) I L R 28 M 84: 14 M L J 468.
8. (1899) I. L. R. 22 M. 347: 9 M. L. J. 98.
9. (1904) I. L. R. 28 M. 26: 14 M. L. J. 413.
10. (1913) I. L. R. 40 C. 534.
11. (1921) I. L. R. 43 A. 547 (F. B.).

Zamindar of Ettiyapuram v. *Chidambaram Chetti* (12), that the waiver of objection to the passing of the final decree did not carry with it the waiver of the right to object in execution to sale of the properties outside the jurisdiction of the Court. That, of course, was a case of territorial jurisdiction, but it appears to me that the same principle must apply. Therefore there seems to me to be a considerable body of opinion that, although a final decree may be passed without objection or even by consent, still the parties have no power by their act, nor indeed has the Court power, to evade the clear provisions of a statute, if it is passed in the interests of public policy and not merely to benefit a particular class or individual. With some hesitation and with some regret, considering the course this case has taken in the Court below, I have come to the conclusion that this objection urged by the learned vakil for the appellant, though it is urged in appeal from an executing Court, must be given effect to.

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The result is that the appeal must be allowed. As this has been taken as pointed out for the first time in the High Court, I am not disposed to make any order as to costs.

Curgenven, J.

Curgenven, J. :—In or about 1827 the then Rajah of Kalahasti, which at that time was not, as it has subsequently become, an impartible estate, made a gift of three villages, Anjur, Pallam and Adaram, to his daughter and son-in-law on the occasion of their marriage. Attached to this gift was an obligation to pay a sum equivalent to Rs. 800 to the Rajah as the proportionate share in the peishcush. A few years later the Rajah took back Adaram, at the same time relieving the donees of their liabilities to make the contribution, so that they held the other two villages as a tenure similar to free-hold. The present respondent has succeeded to the possession of Anjur upon these terms, while Pallam is in the hands of the 2nd defendant in the suit out of which this appeal arises. Various others of the zamindari villages were from time to time alienated to persons represented by others among the defendants. In Fasli 1324 the Rajah failed to pay the peishcush and road-cess amounting to some Rs. 14,000 upon the villages in his possession, and eleven villages, including the respondent's village, Anjur, were advertised for sale. Anjur was in fact ordered to be sold first, and, to avert this, the respondent was forced to pay a sum of nearly Rs. 13,000 in order to obtain the release of his property from attachment. Accordingly he sued

12. (1920) I. L. R. 43 M. 675: 39 M. L. J. 203 (F. B.).

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the Rajah and others holding portions of the estate for reimbursement of this sum. While the suit was proceeding, the Rajah (1st defendant) died and his successor was added as 30th defendant. A decree was passed in the terms set out by my learned brother against the assets of the 1st defendant in the hands of the 30th defendant and against various others of the defendants, making them jointly and severally liable for a certain sum. It is said that the 30th defendant, who is the appellant here, resolved to appeal against this decree in so far as it did not make his liability proportionate only to the extent of the estate still in his possession, and that he desisted from so doing upon receiving an undertaking from the decree-holder that he would not proceed against him beyond this limit. Nevertheless an execution petition was filed praying for the sale of certain of the appellant's villages in discharge of the whole amount recoverable from him under the decree. The petition was resisted upon the ground of the alleged undertaking, and it is from the order of the learned Subordinate Judge of Chittoor directing execution to proceed that this appeal is preferred.

The agreement, if in fact it was entered into, was oral, and the question how far such an agreement can be pleaded in bar of execution has been discussed under two aspects:

(*a*) that it was an agreement to adjust, if not an adjustment of, the decree;

(*b*) that it was an oral agreement varying the terms of the decree.

Now, as to (*a*), it is clear that if the agreement amounted to an adjustment of a portion of the decretal amount, it would be invalid as not certified under O. 21, R. 2 (3) of the Code of Civil Procedure. It has not been very strenuously argued that it does amount to an adjustment, and if we adopt Sadasiva Aiyar, J.'s definition in *Lodd Govindoss* v. *Ramdoss* (5) of that term as "a transaction which extinguishes the decree as such in whole or in part and results in a satisfaction of the whole or a portion of the decree in respect of the particular relief or reliefs granted by the decree" the agreement cannot be said to conform to that description. The further argument that a mere agreement to adjust, which falls short of an adjustment, need not be certified under O. 21, R. 2 in order to bar execution, appears to me to be wholly untenable. If there must be not only an adjustment but, further, a certification

5. (1915) M. W. N. 225 at 226.

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of it, *a fortiori,* an agreement to adjust cannot avail the judgment-debtor.

I think it is clear that the alleged agreement falls under (*b*) above; it modifies the decree by restricting the appellant's liability in a manner for which the decree does not provide. As an oral agreement, I hold that it offends against the terms of S. 92 of the Indian Evidence Act. The learned Judges who decided *Debendra Narain Sinha* v. *Sourindra Mohan Sinha* (2) considered that the words "any matter required by law to be reduced to the form of a document," being controlled by the words "as between the parties to any such instrument or their representatives in interest", must be construed as meaning "contracts, grants, or other dispositions of property which are required by law to be reduced to the form of a document". With great respect I do not feel constrained by the language of the section to narrow its scope in this manner, more especially as it seems as objectionable that the parties to a decree should orally vary its terms as that they should so vary the terms of any 'dispositive' instrument. It does not therefore seem reasonable to attribute to the Legislature an intention to permit the one while prohibiting the other. Nor do I see any difficulty in applying the phrase "the parties to any such instrument" to a decree-holder and a judgment-debtor. I prefer therefore to adopt the construction favoured in *Lachman Das* v. *Baba Ramnath Kalikamliwala* (4) and by Napier and Krishnan, JJ., in S. A. No. 52 of 1920 and to hold that S. 92 does preclude the proof of an oral agreement modifying the terms of a decree.

The appellant has for the first time raised a further objection in this Court that S. 6 of the Impartible Estates Act is a bar to the execution of the decree against any villages in the estate, the consent of the Collector to the creation of a charge upon the estate, in respect of a debt incurred for the payment of land revenue, which that section requires, not having been obtained. This was a matter which might have been taken into consideration in framing the decree itself. Neither was this done, nor was an appeal against the decree preferred, nor did the appellant even raise the point before the Lower Court in the execution petition

In all ordinary circumstances, therefore, it would be necessary to disallow it, and to adhere to the general principle that an

2. (1914) 24 I. C. 391.

4. (1921) I. L. R. 44 A. 256.

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executing Court cannot inquire into the validity of the decree. But there is a class of cases to which, I think, these considerations do not apply, namely, where execution of the decree would involve the infraction of a provision of law enacted in the public interest. The consideration that the parties may not have raised the point does not apply, because it may not have been in their interest to do so; and however far the doctrine that the executing Court should enforce the decree as it stands may be pushed, it cannot extend to an enforcement which involves breach of such a provision. It is the duty of the Court, however and whenever such a consequence becomes apparent to it, to stay its hand. It is, of course, otherwise when the provision of law is designed to protect the interests only of the class of persons to whom the judgment-debtor belongs, so that it may be dispensed with without infringing any public right or public policy. (Maxwell on Interpretation of Statutes, 5th Edition, page 625.)

This principle has been applied in a Madras case, *Raja of Vizianagaram* v. *Dantivada Chelliah* (7), where the Maharaja of Vizianagaram obtained a decree for the sale of a land under a mortgage. After the decree was passed it came to light that the land was a service inam, being the emoluments attached to the office of the village carpenter. S. 5 of the Madras Hereditary Village Offices Act (III of 1895) declares that such emoluments shall not be liable to be transferred or encumbered in any manner whatsoever, nor shall any Court attach or sell them. It was contended that, notwithstanding this prohibition, the decree for sale must be carried out. The learned Judges (Subramania Aiyar and Sankaran Nair, JJ.) held that if the interdiction upon alienation were merely for the benefit of particular persons, it might be waived; but where the prohibition had some object of public policy in view the rule was to enforce the prohibition literally and strictly. Finding that S. 5 had been framed on considerations of such a policy, they declined to order the sale. The same principle underlies the decision in *Vasanji Haribhai* v. *Lallu Akhu* (13), where a mortgage suit was brought in respect of a land held upon a certain special tenure without obtaining the Collector's sanction, as required by law, and the decree was held to be void for that reason. The distinction between a rule of law founded upon general policy and a rule enacted for the benefit of persons in the situation of the judgment-debtor is brought out in *Mayan Pathuti* v. *Paku-*

7. (1904) I. L. R. 28 M. 84. 14 M. L. J. 468.
13. (1885) I. L. R. 9 B. 285.

Rajah of Kalahasti v. Muni Venkatadri Rao Garu.

Curgenven, J.

ran (8), where the question which arose was whether a sale under a mortgage decree in contravention of S. 99 of the Transfer of Property Act (now O. 34, R. 14 of the Code of Civil Procedure) was void. It was held that the object of the rule being to protect only persons concerned with the right to redeem mortgaged property, it could not be held to be void. For another instance of the effect of the introduction of a provision of law founded upon public policy, reference may be made to *Lakshmi Bibi Kujrani* v. *Atal Bihary Haldar* (10), where the Chota Nagpur Tenancy Act, 1908, came into force between the passing of the preliminary and final decrees in a mortgage suit. The Act disabled the Courts from passing a decree or order for the sale of the right of a ryot in his holding, and it was held that neither should the final decree have been passed nor, if passed, should the property in question have been sold in execution. A plea of estoppel against the judgment-debtor was urged but the answer made to it was that he could not be estopped from bringing to the notice of the Court what the Court must be taken to have known of itself, that there was a distinct provision of law which prevented the sale of the property. A Full Bench of the Allahabad High Court has held to the same effect upon the general question in *Katwari* v. *Sita Ram Tiwari* (11).

Raja Ramachandra Suru Harischandra Deo Garu v. *Akella Venkatalakshminarayana* (14) is a case under S. 4 of the Impartible Estates Act, which prohibits a proprietor from alienating any portion of the estate except for family necessity. The learned Judges refer to the policy underlying the Act, and decide that a mortgage decree for sale is unenforceable unless the terms of S. 4 are satisfied. Another case under the same section is *Venkatalingama* v. *Arunachellam Chettiar* (6) decided by my learned brother and Krishnan, J. There, however, no question of refusing to enforce the decree arose, as it was a money decree; but it was held that the decree-holder could not proceed against the estate unless he showed that the debt was binding on the family.

The provision of law which, it is said, will be infringed by the sale directed under the decree is S. 6 of the Madras Impartible Estates Act (II of 1904). It lays down that "the proprietor of an impartible estate shall be incapable of alienating or

6. (1923) 19 L W 132. 8 (1899) I L R 22 M 347: 9 M L J 98.

10. (1913) I. L. R. 40 C. 534.

11. (1921) I L R 43 A. 547 (F. B.).

14. (1918) 37 M. L. J. 65.

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binding by his debts such estate or any part thereof beyond his own life-time for the payment of land-revenue due to Government, unless he shall have first obtained the consent in writing of the Collector of the district in which the estate is situated". The Act of which this section forms part applies, as the Schedule shows, to a large number of estates throughout the Madras Presidency. Besides S. 6, S. 4, as I have already mentioned, also imposes a restriction upon the power of alienation by the proprietor for the time being; and it cannot be doubted that the object of the Act is the preservation of these estates in the hands of successive heirs, as a measure of public policy. Now if S. 6 incapacitates a proprietor from alienating the estate or any part of it, or binding it by his debts, beyond his own life-time, for the payment of land revenue, it is clear, I think, that he cannot do this indirectly by failing to pay the land revenue with the result that, after his death, the estate becomes bound in respect of a liability incurred on his behalf by a person interested to pay it. Under S. 69 of the Contract Act a person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other The illustration furnished to this section affords a curiously close parallel to the present case; and there can be no question, I think, that, as soon as the decree-holder paid the arrears of land revenue, his right to reimbursement became a debt due to him from the Zamindar. (*Cf.* S. 35 of the Madras Revenue Recovery Act (II of 1864) which makes such a sum, when paid by a *bona fide* mortgagee or other incumbrancer 'a debt from the defaulter'). For that debt, now that the Zamindar who incurred it is dead, the estate cannot be proceeded against. It can be of no avail to urge that S. 6 does not impose an absolute bar, inasmuch as the bar may be removed by the consent in writing of the Collector. That consent was not obtained, but the prohibition accordingly stands good. I conclude, therefore, that the relief prayed for in the execution petition of 26th July, 1924, and allowed by the learned Subordinate Judge in his order under appeal, must be refused, and I would allow the Civil Miscellaneous Appeal and dismiss the petition. I agree in making no order as to costs.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE CURGENVEN.

K. R. M. Singaram Chettiar ... *Appellant** (*7th Deft.*)

v.

K. Srinivasa Aiyangar and others ... *Respondents* (*Plffs.* 1 *to* 7 *and Defts.* 1, 2, 4 *to* 6 *and* 8).

Singaram Chettiar v. Srinivasa Aiyangar.

Religious Endowments Act (*XX of* 1863), *S* 10—*Resolution fixing date of election—Basis being voters' list which was old and antiquated—Dissenting member requisitioning reconsideration of resolution according to rules—No fresh resolution passed—Managing member fixing date of election and holding election on the basis of the old voters' list—Validity of election—Plaintiffs having their names in the old voters' list—If entitled to sue under S* 92, *Civil Procedure Code*

A vacancy was caused in a Temple Committee by the death of a member of the Committee. Thereupon a resolution was passed on 18th January, 1920, that the 1st defendant who was said to be the managing member should issue notices and take the necessary steps for holding an election on 22nd February, 1920 and that the voters' list prepared in 1908 be the basis for such an election. There was a rule of the Committee by which if a member calls for a reconsideration of a resolution passed within 24 hours after the passing of such a resolution it was to be kept in abeyance and not acted upon until it was reconsidered and reaffirmed. Acting under this rule, the 6th defendant called for a reconsideration both of the date of the election and of the footing on which it was to be held, namely, the electoral roll of 1908. It appeared that 180 voters who had a right to vote were not in the 1908 list but wanted their names to be included in the list and had accordingly put in their applications. Upon this requisition of the 6th defendant, meetings were held on 1st February, 1920 and 11th February, 1920, but nothing was done and the date of the election was adjourned to 14th March, 1920. A meeting was next held on 24th February, 1920 and again on 2nd March. 1920, but nothing was done even on these dates Then the 1st defendant took upon himself to pass proceedings and directed that an election was to be held on 14th March, 1920 and an election was in fact held on that day based on the voters' list of 1908.

Held, that the election was not validly held firstly because there was no resolution which could be enforced fixing the date of the election under S. 10 of the Religious Endowments Act, the original resolution of 18th January, 1920 having been re-opened for further consideration by the requisition of the 6th defendant according to the rule, and secondly because the voters' list of 1908 which was old and antiquated could not be said to be in compliance with R. 14 of the Rules of the Committee which required that the Committee should keep a register of voters

Tiruvengada v. *Ranga,* (1882) I L R 6 M 114 distinguished.

Per Curgenven, J .—S. 92 of the Civil Procedure Code enables two or more persons that have an interest in the trust to sue for certain reliefs

*S. A. No. 730 of 1924. 6th December, 1926.

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and it is not necessary that they should have been personally affected by any act done by the person or persons sued Therefore, though the names of the plaintiffs in the suit were in the 1908 list of voters, they are entitled to bring this suit under S. 92 of the Civil Procedure Code.

Second Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in A. S. No. 109 of 1923 preferred against the decree of the Court of the District Munsif of Kumbakonam in O. S. No. 122 of 1920.

S. Muthiah Mudaliar and *T. S. Venkatesa Aiyar* for appellant.

T. V. Muthukrishna Aiyar, N. Kunjithapatham and *K. Narasimha Aiyangar* for respondents.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS :—*Kumaraswami Sastri, J.* :—This Second Appeal arises out of an election to a temple committee and the question is whether the election of the 7th defendant is valid. A vacancy was caused in the Devasthanam Committee by the death of one Ponnusami Nadan. Thereupon there was a resolution passed on the 18th January, 1920, that the 1st defendant who was said to be the managing member should issue notices in connection with it, appoint the tellers and take the necessary steps for holding an election, that the voters' list prepared in 1908 be the basis for such an election and that the election be fixed to take place on the 22nd February, 1920. The 6th defendant objected to this resolution on the ground that a correct list of voters had not been prepared in spite of the resolution of the committee to that effect passed on December 18, that the list of 1908 was old and defective and did not contain the names of more than 5 per cent. of the legitimate number of voters. Both the Courts find that there was a valid rule or practice of the committee by which if a member calls for a reconsideration of a resolution passed within 24 hours after the passing of such a resolution it was to be kept in abeyance and not acted upon until it was reconsidered and reaffirmed. Acting under this rule the 6th defendant who was a dissenting member called for a reconsideration both of the date of the election and of the footing on which it was to be held, namely, the electoral roll of 1908. He wanted a new list to be prepared as the old list was very antiquated. It appears that a new list was prepared but only wanted confirmation. It also appears that as many as 180 voters who had a right to vote were not in the 1908 list but wanted their names to be included in the present list and to this effect they put in their applications. Upon this requisition of the

Singaram Chettiar v. Srinivasa Aiyangar.
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Kumaraswami Sastri, J.

6th defendant for reconsideration, a meeting was held on the 1st February, 1920, but as there was no quorum the meeting was again held on the 11th February and there were about 40 subjects on the agenda but the meeting dispersed without any business being transacted and it was adjourned to the 24th February. Again the election was adjourned to the 14th March, 1920 with the hope that something will be done by that time but nothing was done. Even on the 24th February, 1920, nothing could be done as there was not a majority of four members of one view as was required by the by-laws for a resolution to be passed. Then the meeting was adjourned to the 2nd March but there was no quorum even then. Then the 1st defendant took upon himself to pass proceedings and directed that an election was to be held on the 14th March and an election was in fact held on that day. The question is whether that election is valid. I am clearly of opinion that the election held under such circumstances is clearly void as has been found by the Subordinate Judge. First of all there was no resolution which could be enforced fixing the date of the election. The basis on which the election was to take place, namely, the electoral roll, was still under consideration and there were applications for registration as voters and until the matter was considered, the resolution fixing the date of the election had no validity or effect. Further it is not shown that the authority of the 1st defendant alone is sufficient to proceed with the election. It was virtually carrying into effect a resolution which was not validly disposed of. The 6th defendant objected to the list of 1908 being used for election in 1920, that it was long out of date and could not now be used and that 180 members, who had the requisite qualifications to vote, had applied and their applications were kept pending while the election was allowed to be proceeded. There was nothing in the rules that their names could not be entered in the new list as eligible to vote for the 1920 election. I do not see how the resolution of the 18th January can be divided into two separate and independent portions, as the District Munsif has done, one of them as having authorised the holding of election and the other as having authorised its being held on the footing of the voters' list of 1908. I do not see how it can be held that the date of the election was irrevocably fixed for the date on which it was held while the basis on which the election was to be held was not yet disposed of and was the subject of reconsideration. I agree with the Subordinate Judge that it was only a single

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resolution kept in abeyance and was the subject of reconsideration. It is clear that R. 14 requires that there shall be a register of voters eligible to vote for the election and that rule was not complied with inasmuch as there was no correct list of voters in 1920. I think that the election held in these circumstances is not valid.

Reference was made to *Tiruvengada* v. *Ranga* (1) to show that it is not material whether the list of voters was of 1908 or any other year. It is said that even if the list is quite out of date it does not matter. It is sufficient for our purpose to state that the question now raised goes far beyond that. In this case there was no resolution at all under which an election can be validly held and again there arises the further question of how far an election held is valid which does not dispose of the applications of persons who claim to have a right to vote in the election and which applications ought to have been considered. I am of opinion that where the validity of the list on which the election is to be held is in question and where the applications of persons who are qualified to vote and who claim to be enlisted as voters are not considered, an election held on the basis of a list which was several years old would not justify the election as a valid one. To hold otherwise would be a negation of all elective principles and actually vest in the trustees the power to disenfranchise voters who are duly qualified to vote and are entitled to exercise their right. I think that the broad rule laid in *Tiruvengada* v. *Ranga* (1) that a list however inadequate would not invalidate an election requires reconsideration. The facts of this case however are not similar and the ruling has no application. I think the Subordinate Judge's judgment is correct, and the Second Appeal fails and is dismissed with costs.

Curgenven, J.

Curgenven, J. :—I agree. There are two clear reasons for holding with the learned Subordinate Judge that the election was not validly held, firstly, that it was not duly authorised by the committee, and, secondly, that the basis of it, namely the voters' list, had not been revised. As regards the first point, S. 10 of the Religious Endowments Act (XX of 1863) requires that when a vacancy arises the remaining members of the committee shall among other things fix a date for the election of a successor. My learned brother has summarised the

1. (1882) I L R 6 M 114.

Singaram Chettiar v. Srinivasa Aiyangar.

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effect of the several meetings held on the 18th January and subsequently, and I think it is sufficient therefore to draw attention to the so-called "Proceedings" of the 2nd March, 1920, from which it is evident that the committee had left the matter in abeyance pending disposal of the 6th defendant's objection with regard to the voters' list, and that objection had still not been disposed of. It is then recited that as the period of three months prescribed for the election would soon terminate, it was not possible to postpone the matter any further. There is clearly an implied admission here, I think, that the projected course was irregular owing to a lack of any clear expression of the committee's will that the election should be held on the date on which it was in fact held. Accordingly the provisions of S. 10 were not complied with and the election was unauthorised.

With regard to the second point, the voters' list dated from 1908 and such a list cannot be held to be in compliance with R. 14, which requires that the committee should keep a register of voters. A list so antiquated cannot be a register of voters at all, because a very large proportion of persons eligible to vote were omitted from it. This is clear from the circumstance that as many as 180 applications had been received for inclusion in the list and were still kept pending, a circumstance which I think clearly differentiates the facts of this case from those considered in *Tiruvengada* v. *Ranga* (1). I am unable to accept the suggestion that the matter was of no practical importance because the majority of votes obtained in the event was such that even if all the 180 had been included on the other side the result would have been the same. Unless there is some provision to the contrary, the validity of the election depends upon the regularity of the procedure according to which it is held and not upon the results, which may by accident be the same as if it had been regularly conducted.

I have only to notice one more objection, which is that both the plaintiffs were in the 1908 list of registered voters and accordingly that they had no grievance which entitled them to bring a suit under S. 92, Civil Procedure Code. That section enables any two or more persons that have an interest in the trust to sue for certain reliefs and it is not necessary that they should have been personally affected by any act done by the person or persons sued. It is sufficient that they have

1. (1882) I L R 6 M 114.

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Curgenven, J.

enough of an interest in the trust to see that the trust is properly conducted and that the terms whereby it is regulated are complied with. I think accordingly that the plaintiffs were fully competent to sue under S. 92, Civil Procedure Code. In the result I agree with my learned brother that the Second Appeal fails and should be dismissed with costs.

N. S. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

K. S. Natesa Aiyar ... *Plaintiff* (Appellant)*

v.

Sahasranama Aiyar and others ... *Defendants (Respondents).*

Natesa Aiyar v. Sahasranama Aiyar.

Hindu Law—Joint family—Property standing in the name of a junior member—Junior member a minor on the date of the purchase—Presumption of being joint family property—Mortgage by father—When binding on son's share—Mortgage by father for performance of obligations in connection with chit transaction—If binds son's share—Document if amounts to a mortgage or charge—Transfer of Property Act, S. 58.

Where there is property standing in the name of a junior member of a joint Hindu family, the presumption is that it is joint family property, especially when the junior member was a minor at the time of the purchase and the family had ancestral property.

A Hindu father may mortgage his son's share for necessity or for a benefit to be conferred on the joint family. A mortgage executed by him as the stake-holder of a chit fund for the due performance of his obligations in connection with the chit is not binding on his son's share of the joint family property, as the chit transaction is a speculative one and the family will get into trouble by the father being irregular in his dealings with the subscribers to the chit.

A document executed by the stake-holder of a chit fund making immoveable properties liable for the due performance of his obligations in connection with the chit falls within the definition of a "mortgage" under S. 58 of the Transfer of Property Act and does not amount to a charge only, because it effects security of the property for the due performance of an engagement which may result in a pecuniary liability like simple mortgage bonds.

Second Appeal from the decree of the District Court of West Tanjore in A. S. No. 76 of 1922.

K. P. Ramakrishna Aiyar for appellant.

N. Sivaramakrishna Aiyar for respondents.

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*S. A. No. 111 of 1924. 6th January, 1927

Natesa Aiyar v. Sahasranama Aiyar.

The Court delivered the following

JUDGMENT :—I would state the facts of this case fully as I am not satisfied with the treatment of the case by the Lower Courts. Defendant was the stakeholder of a chit fund, and, for the due performance of his obligations in connection with the chit transactions, he executed a kootchit deed, dated 23rd March, 1914, mortgaging two items of his property. In item 2 he had originally an ancestral property only 47 cents, but the other 47 cents, which at first belonged to his brother Kuppuswami Aiyar, were purchased in 1910 by a sale-deed, Ex. I (*a*) and the sale-deed stands in the name of defendant 2, son of defendant 1, being minor by his mother as guardian. Thus in 1914 he was in possession of 94 cents of this item and this was mortgaged by Ex. A. The plaintiff is one of the subscribers to the chit and he bid at one of the auctions in 1918, by which he became entitled to the suit amount. He, therefore, brings the suit to recover the amount by sale of the property mortgaged under Ex. A. Defendants 3, 4 and 5 are the purchasers of item 2 subsequent to execution of Ex. A, that is under Ex. I, dated 20th April, 1915. The District Munsif's judgment is somewhat perfunctory, because it does not state what the defences of the defendants are in this case. As a matter of fact defendants 1, 2, 3 and 4, all have filed written statements, and reference is made to these written statements. However, I had them all read out before me. Defendant 1 did not appear at the time of the trial. The District Munsif framed two issues "(1) To what amount is plaintiff entitled ? (2) What are the properties subject to the charge?"

Issue 1 was framed with reference to some questions raised by defendant 1 as to the exact amount due to the plaintiff. Issue 2 was raised with reference to the plea of defendants 3 and 4, namely (1) that Ex. A will not be binding on the half-share of Kuppuswami Aiyar which was purchased in the name of defendant 2 in 1910 and which was afterwards sold to defendant 4 in 1915; (2) that the mortgage was also not binding upon the son's half-share of the original ancestral property of 47 cents on the ground that it is not made for necessary purposes. The issue might have been made clearer so as to state these points expressly, but however, I find that both the District Munsif and the District Judge discuss these points and these are the points that are argued by the parties throughout. I, therefore, think that nobody has been prejudiced by the frame of the issues.

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The issue 1 is not before me. As to issue 2 the District Munsif found that in 1910 defendant 2 had no property of his own. It is admitted he was a minor. He also observed that there was no evidence to rebut the presumption of Hindu Law that a purchase in favour of the junior members of the family was really a purchase of the family. He also referred to the fact that the father joined in the further sale and he found that the purchase of 47 cents in 1910 was also a joint family property and could not be regarded as deft. 2's self-acquisition.

Then as to the other point raised by the defendants, namely, whether the transactions were for necessity: he found that the chit was for family benefit, referring to the evidence of P. W. 1, and, therefore, he thought that Ex. A was binding on the whole of items 1 and 2. He, therefore, gave a decree to the plaintiff as prayed for. Only defendants 4 and 5 appealed, defendant 3 having died. On appeal the learned District Judge held that the purchase in 1910, in the name of defendant 2, must be regarded as a separate transaction. He says: "It may be that the purchase money came from his mother." This is merely a possibility. It is true that the purchase money may have come from the mother. But defendants 3 to 5 adduced no evidence in the case and there is no evidence to show that the mother advanced any money. In *Bammu Shetti* v. *Dharmu Shetti* (1), the case referred to by the District Munsif, but not by the District Judge, it was held following *Parbati Dasi* v. *Baikunthanath Deo* (2), that where there is property standing in the name of a junior member, the presumption is that it is joint family property. This presumption is of course liable to be rebutted. It may be a very weak presumption in some cases and it may be easily rebutted. It may be stronger in other cases in which case stronger evidence would be required to rebut it. But in the present case there is no evidence and one has to start with the presumption that the purchased property was joint family property seeing that defendant 2 was a minor at the time of the purchase and that the family had ancestral property. The District Judge makes no reference to such a presumption. He does not start the discussion of the case with such a presumption. He merely refers to the possibility of the purchase money coming from the mother and comes to the conclusion that the property must be regarded as defendant 2's property.

1. (1916) 5 L. W. 259.
2. (1913) 26 M. L. J. 248.

Natesa Aiyar v. Sahasranama Aiyar.

I, therefore, reverse this finding of the District Judge and hold that, in the absence of evidence on the side of the defendants, the purchase of the 47 cents in 1910 must be regarded as ancestral property. But this does not dispose of the case. The next question still arises whether even as regards the whole of the 94 cents, the mortgage is binding upon the whole of the item, or only on the father's share of item 2, *i.e.,* 47 cents. This depends upon the consideration whether Ex. A falls within the power of a Hindu father seeking to mortgage his son's property. There was no antecedent debt in 1914. Because Ex. A was not executed for antecedent debt, the District Judge held that it is not binding on defendant 2. But I do not think that is enough to dispose of this suit. The father may mortgage his son's share for necessity or for a benefit to be conferred on the joint family. Here Ex. A was executed in connection with the chit fund transaction and the father is immediately benefited to the extent of Rs. 500, when he insured obligations in connection with the future performance of the chit. If he honestly performs these obligations the family need not come to any trouble; but, if he is irregular in his dealings with the subscribers to the chit, the family will get into trouble. In the case of prudent management the prudent manager or father might benefit the family, but this is a case where the family might get into trouble and lose properties. After all it is a speculative transaction. A chit fund is not like the ordinary transactions of a Hindu family. It bears no resemblance to money borrowed for maintaining the family, for performing the marriages or upanayanam, or paying the Government revenue, or educating boys in the family, or paying off antecedent debts. There is the possibility that a chit fund transaction may end in profit, but it is not a transaction for which the father can mortgage his son's share. I therefore hold that Ex. A is not binding on the son's half-share of the whole of item 2. The plaintiff is therefore entitled to a decree against the father's half-share but not against the son's half-share. To this extent I modify the decree of the District Judge.

Mr. Sivaramakrishna Aiyar who appears for the respondent argued before me on other points and wished to support the decree of the District Judge on such points. First, he argued that Ex. A is not properly proved; and secondly, that Ex. A amounts to a charge only and not a mortgage, and if it is a charge, he is a *bona fide* purchaser without notice and that his purchase in 1915 takes priority over the plaintiff's

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mortgage right. The first two points were not made the subject of issues; and, so far as the first point is concerned, I am not going to allow it to be raised here. As to the second point: it was not even raised in the grounds of the Lower Appellate Court. What was raised in the grounds is merely that Ex. A does not give any kind of charge at all. That is because the plaintiff's chit was in 1910, whereas his sale was in 1918, and the defendant's sale takes priority over the plaintiff's mortgage right. But beyond this, the question, whether this would not amount to a mortgage, was not raised in the grounds, nor was it argued before the District Judge.

It seems to me to fall within the definition of S. 58 of the Transfer of Property Act, because it effects security of the property for the due performance of an engagement which may result in a pecuniary liability like simple mortgage bonds, which are usually executed in this presidency. If it is a mortgage bond, no question of defendants 3 to 5 being *bona fide* purchasers without notice would arise in the case. But, if such a question arises, I do not see how these defendants 3 to 5 can be regarded as *bona fide* purchasers without notice. There is, no doubt, a recital in the sale-deed Ex. I, that there were no prior encumbrances. No purchaser is satisfied with such representations by the vendors. It is his duty to enquire. In this case there is no evidence as to what enquiry he made. The burden of proving that he was a *bona fide* purchaser without notice was on him, and he has not gone into the box to prove that he made further enquiries and he had no notice of an earlier registered document. But, as I have already said, I do not think any such question arises. The result is that in modification of the decrees of the Courts below the plaintiff will have a decree for the sale of item 1 and defendant 1's half-share in item 2, that is 47 cents.

Another point raised by Mr. Sivaramakrishna Aiyar is that the other subscribers to the chit fund ought to be made parties. This again was not the subject of issue, and, after all, I do not see how the joinder of the parties is fatal to the suit. The particular amount sued for belongs to the plaintiff, and, though Ex. A was executed for the due performance of the obligations to all the subscribers, it is really for the performance of the respective obligations when the amount of each subscriber accrues. The present amount is due only to the plaintiff. I do not think there is any substance in the point; but, even if there is any, I cannot allow it to be raised now.

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The plaintiff will get his costs of the first Court from defendants 1 and 2, and in the Lower Appellate Court and here he will bear his own costs. Respondents 3 to 5 will bear their own costs throughout.

N. S. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE VENKATASUBBA RAO.

Rapaka Venkateswarlu *alias* Gurraja, minor by next friend Rapaka Venkatanarayana Sarma ... *Appellant* (Defendant)*

v.

Ayyagari Suryaprakasam ... *Respondent (Plaintiff).*

Venkateswarlu v. Suryaprakasam.

Limitation Act, S 20—Agent in this behalf—Authority to make payment if enough—Authority to make indorsement if also necessary.

The authority referred to in S. 20 of the Limitation Act is an authority to make the payment. It is not necessary under the section that the agent who pays should also be authorised to make the endorsement or get the same done by another.

Second Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. No. 70 of 1922 preferred against the decree of the Court of the District Munsif of Razole at Amalapuram in O. S. No. 637 of 1920.

G. Lakshmanna and *K. Kameswara Rao* for appellant.

P. Somasundaram for respondent.

The Court delivered the following

Ramesam, J.

JUDGMENT :—*Ramesam, J.* :—This Second Appeal arises out of a suit on a mortgage bond Ex. A, dated 26th September, 1898. The bond provided for compound interest at 13½ per cent. per annum with annual rests. It was executed by the three brothers. One of the brothers died and the property and the liability fell to the other two brothers. On the 4th July, 1903, a portion of the property was sold and a payment of Rs. 709 was made towards the bond but this payment was not endorsed on the bond. On the 31st March, 1914, another payment of Rs. 20 was made and this was endorsed on the bond. In this the old payment of Rs. 709 was referred to. This endorsement was signed by one of the two surviving brothers, Subbarayudu. The elder brother Seshiah did not sign it. The 1st defendant is the adopted son of Seshiah. In the plaint the plaintiff relied upon this payment by Subbarayudu and endorse-

* S. A. No. 1097 of 1923. 11th April, 1927.

Venkateswarlu v. Suryaprakasam. Ramesam, J.

ment as saving limitation. In the written statement all that the defendant stated was that the endorsement is not genuine.

Oral evidence has been adduced by the plaintiff to show that the payment by Subbarayudu was authorised by Seshiah The Subordinate Judge believed this evidence. That is all that S. 20 requires. The District Munsif dismissed the suit but the Subordinate Judge decreed it. The Second Appeal was filed in respect of only Seshiah's half share and all the grounds raised the question whether the action of Subbarayudu was binding on Seshiah and no other point has been raised. At the time of the hearing of this Second Appeal it is sought to be argued that the whole endorsement is not in the handwriting of Subbarayudu and cannot be relied on even as that of Subbarayudu. Mr. Somasundaram appearing for the respondent contends that it was never raised in the pleadings. If it had been pleaded he would have adduced evidence that Subbarayudu was practically illiterate and his case stands on the same footing as that of a marksman, and I may observe that the handwriting of the signature of Subbarayudu supports this suggestion. The letters are very big like those of a man who has just learnt the alphabet. This being a state of the pleadings and there being no such ground taken in Second Appeal, I do not think that Mr. Lakshmanna can be allowed to take such point here. It is also argued that there is no evidence to show that Subbarayudu was authorised to make the endorsement either in his own handwriting or get the same done by another, but the evidence only shows that he was authorised to make the payment. This is true. S. 20 does not require that the agent "in this behalf" must be more than an agent for the purpose of payment. It does not say that the agent who pays should also be authorised to make the endorsement or get the same done by another. It is enough if he was authorised to make the payment; it is not necessary that he should also be authorised in respect of endorsing the payment.

The Second Appeal fails and is dismissed with costs.

Venkatasubba Rao, J.

Venkatasubba Rao, J. :—Two points of law have been raised. When this appeal was referred to a Bench I thought and I still think that *Lodd Govindoss Krishnadoss* v. *Rukmani Bai* (1) requires to be reconsidered. In the state of the pleadings this point cannot, however, be allowed to be raised and for the present I content myself with saying that the

1. (1913) I L R 38 M 438.

Venkateswarlu v. Suryaprakasam.

Venkatasubba Rao, J.

decision in *Lodd Govindoss Krishnadoss* v. *Rukmani Bai* (1) is opposed to the principle in *Ellappa* v. *Annamalai* (2). It is impossible to regard both these decisions as correct and it seems to me that the observations of Hutchins, J., in the earlier case which deals with a mark and a signature as being on the same footing, are worthy of careful consideration. This disposes of the first point.

It is secondly contended that while it has been shown that Subbarayudu was authorised to make a payment towards the principal of the debt, there is no proof that he had authority to make the endorsement. The question turns on the construction of S. 20 of the Limitation Act. The authority referred to in this section is the authority to make the payment and the section does not say that special authority must also be proved to make the endorsement. The section assumes that authority to make the payment carries with it the authority to make the endorsement. In this case it has been proved that Seshayya authorised his younger brother Subbarayudu to make the payment. He not only made an endorsement but made an endorsement which contains a record of the payment. He was competent to make that endorsement without being specially empowered and the claim is therefore saved from the bar of limitation.

In the result, I agree that the Second Appeal fails and should be dismissed with costs.

A. S. V. —— *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Thotapally Sarvabhotla Venkata Chandikamba, lately a minor by next friend and father Devulapally Suryanarayaniah, declared a major—*vide* Order, dated 15th February, 1926, on C. M. P. No. 561 of 1926 ... *Appellant** (*Plaintiff*)

v.

Shroff Venkata Rao and another ... *Respondents* (*Defendants Nos. 2 and* 4).

Sarvabhotla Venkata Chandikamba v. Venkata Rao.

Hindu Law—Adoption—Ante-adoption agreement—Construction—Property reserved by adoptive mother—Estate taken in—Life-estate with power

*Appeal No. 304 of 1922. 8th December, 1926

1. (1913) I L R 38 M 438.
2. (1883) I. L. R. 7 M. 76.

Sarvabhotla Venkata Chandikamba v. Venkata Rao.

of alienation—Adopted son's right only to succeed to property undisposed of by her

There may be a life-estate with powers of disposition.

The material parts of an agreement between an adoptive mother and the natural mother and brother of the adopted boy were as follows:—

"Thereupon it having been arranged between us that out of the property in my possession and belonging to my husband, the said *K* (adopted boy) shall be entitled to enjoy only the property noted in the Schedule below with all the rights, that the remaining property, moveable and immoveable, belonging to my husband and which is in my possession, shall be enjoyed independently by myself alone, and that the property which remains after being utilised by me during my lifetime shall be enjoyed after my death by the said *K*, you have agreed to give the said boy *K* in adoption to me on that condition, and having given the boy to me duly in adoption......you put him in my possession. I have therefore henceforward given all the property belonging to my husband as per the Schedule below to my adopted son *K*. The said *K* shall therefore enjoy the said property with all the rights."

Held, that, on the right construction of the agreement, the adoptive mother intended to reserve to herself a life-estate with full powers over the corpus of the properties reserved by her during her life and that as to whatever property was left the adopted son was to succeed.

Appeal against the decree of the Court of the Subordinate Judge of Kurnool in O. S. No. 23 of 1920 (O. S. No. 9 of 1918, District Court, Kurnool).

A. Krishnaswami Aiyar and *W. Kothandaramayya* for appellant.

C. V. Anantakrishna Aiyar and *V. S. Narasimhachariar* for respondents.

The Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—This is now in effect a suit for possession by the plaintiff and the contest lay between the widow of Thotapally Sarvabhotla Krishniah (junior), the adopted son of Thotapally Sarvabhotla Krishniah (senior) and the widow of the latter who adopted plaintiff's husband Krishnayya on 21st May, 1908, in pursuance of a power given to her by her husband in his will Ex. VIII. The widow of Thotapally Sarvabhotla Krishniah (senior) is now represented by her nephew. The adopted son Thotapally Sarvabhotla Krishnayya (junior) died and the plaintiff is his heir. The learned vakil for the appellant mentioned but abandoned argument based on a verbal agreement prior to the adoption and prior to Ex. I. So the only question for us is the proper construction to be placed on Ex. I which is an agreement dated 21st May, 1908, the date of Thotapally Sarvabhotla Krishniah's (junior's)

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adoption entered into by the 1st defendant (the adoptive mother) and the natural mother and brother of the adopted boy. The contested passage is contained in the following extract from the agreement entered into on adoption:—

"Thereupon it having been arranged between us that out of the property in my possession and belonging to my husband, the said Krishnayya shall be entitled to enjoy only the property noted in the schedule below with all the rights, that the remaining property, moveable and immoveable, belonging to my husband and which is in my possession, shall be enjoyed independently by myself alone, and that the property which remains after being utilised by me during my life-time shall be enjoyed after my death by the said Krishnayya, you have agreed to give the said boy Krishnayya in adoption to me on that condition, and having given the boy to me duly in adoption by means of the Datta Homa (the sacrifice performed at the time of the adoption), etc. you put him in my possession. I have, therefore, henceforward given all the property belonging to my husband, as per the schedule below, to my adopted son S. Krishnayya. The said Krishnayya shall therefore enjoy the said property with all the rights."

There is no question as to the scheduled property; the contest is only as to the meaning of the clause dealing with "the remaining property" which it is said

"shall be enjoyed independently by myself alone and that the property which remains after being utilised by me during my life-time shall be enjoyed after my death by the said Krishnayya."

On this the Subordinate Judge found that Subbamma had right to alienate the corpus *inter vivos* or by will and that Krishnayya had a mere contingency creating no vested interest (para. 17 of the judgment). The contention of the appellant before us is that the adoptive mother reserved to herself by this settlement—for that is its effect—a life-estate with full powers of disposition *inter vivos* with remainder to the adopted son as to the properties if any over which she had not exercised her powers of disposition. The respondents, on the other hand, contended that the adoptive mother reserved to herself an absolute estate and Krishnayya took a mere *spes* of inheriting anything after her death—or that the absolute estate once given cannot be cut down by a repugnant clause which proceeds to annex another estate to it. That the adoptive mother (Subbamma) intended to benefit Krishnayya by this clause there can, I think, be no doubt. If she intended merely an absolute estate for herself there was no need to insert the clause at all—she had on this assumption already settled all she intended to settle by the gift of the scheduled properties. It seems also improbable that she intended an absolute estate for herself. Otherwise the words "after being utilised by me during my life-time" would

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have no meaning, as she would, of course, be entitled to deal with property absolutely hers in any way she pleased after her death. The last sentence in Ex. I is relied on by the respondents; that only shows a gift *in praesenti* to Krishnayya. The scheduled properties passed at once, but the remaining properties did not, being retained by Subbamma herself for her life. There is no question that Subbamma was not entitled to dispose of the properties dealt with by Ex. I as she had succeeded to the properties of her husband under his will Ex. VIII. It was attempted to import the term of Ex. VIII into a discussion of the meaning of Ex. I but in my opinion this document cannot be looked at for the purpose of settling the question of the disputed clause in Ex. I.

I now proceed to deal with the cases cited to us. In *Henderson* v. *Cross* (1) Sir John Romilly, M. R., said:

"All these questions turn on this—whether the original gift is a gift of a life-estate with a power over the corpus of the fund or whether it is an absolute interest which is attempted to be cut down".

On the words used there, it was held an absolute gift of all the testatrix's property "to spend both principal and interest or any part of it during his life-time" on the ground that if the legatee left a portion of the interest unspent it could not go to the remainderman (testatrix's sister) because it could not be made less than a life-interest and by the words quoted principal and interest were put on the same footing. There is no such distinction here. In *In re Jones. Richards* v. *Jones* (2) Byrne, J., distinguished *In re Pounder* (3) (cited below). The testator gave property to his wife for her absolute use and benefit and full powers of disposition of his property, etc., for her maintenance and support and after her death as to such parts of his estate as she may not have sold or disposed of to others. It was held that the words "for her absolute use and benefit" were not cut down by the words "so that during her life-time for the purpose of her maintenance and support she shall have the fullest power to sell and dispose of my said estate absolutely," but that the latter were expressive of the object with which the testator made the absolute gift. The principle does not apply here as there is clearly no reservation of an absolute

1. (1861) 29 Beav. 216
2. (1898) 1 Ch. 438.
3. (1886) 56 L. J. Ch. 113.

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estate by the settlor as pointed out above. In *Ross* v. *Ross* (4) it was held that the words used conveyed an absolute estate to the first taker and could not be cut down by a subsequent proviso. In *Karunakaran* v. *The Administrator-General of Madras* (5) it was a case of an absolute vesting in the widow with a pious hope ("after her death she should, etc.") that she might respect the testator's wishes.

On the other hand we have *In re Pounder* (3). The testator by his will gave all his residue to his wife absolutely: by a codicil he revoked this gift and made another gift to her. It was held that he intended to alter his will by the codicil by which he left the residue to his wife "for her absolute use and benefit and disposal, but without prejudice to her powers of disposition" in case at her decease any part thereof should remain undisposed of to other persons. *Held* a limited interest with power of disposal. In the case before us we have no such words as "absolute use and benefit, etc.". What is reserved is clearly a life-estate. The learned Judge referred to and followed *In re Thomson* (6) which has, I think, a material bearing on the case before us. A testator gave all his property to his widow for the term of her natural life to be disposed of as she may think proper according to the nature and quality thereof and "in the event of her decease, should there be anything remaining" to certain other persons. Hall, V. C., held that as the gift was only for life the succeeding words only conferred a power and not property. It was thus a life-estate with a power of disposition *inter vivos*. The case went to the C. A. where the actual decision was that the widow had no power of disposition by will, but two of the learned Lords Justices were of the expressed opinion that the donee took only a life-estate with full power of enjoying the property *in specie*. In *S. M. Hara Kumari Dasi* v. *Mohum Chandra Sarkar* (7) there was a similar case to which a similar construction was applied in order to give effect to all the words in the will. In *Mafatlal* v. *Kanialal* (8) *In re Pounder* (3) was followed and the words

"If I die then my son's wife Bai Ganga is the owner of the above-mentioned immoveable and moveable properties....... The said Ganga shall during her life-time spend and use and enjoy out of my property and

3. (1886) 56 L J Ch. 113.
4. (1819) 37 E R. 334.
5. (1925) 22 L. W. 94.
6. (1880) 14 Ch. D. 263.
7. (1908) 12 C W N 412.
8. (1915) 17 Bom L R 705.

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as to whatever property may have remained over after her decease her two daughters are the owners thereof"

were construed to confer a life-estate on the wife with a power of disposition *inter vivos*. The case is also referred to and the construction followed in *Mithibai* v. *Maharabai* (9). There is thus ample authority in this country as well as in England for holding that there may be a life-estate with powers of disposition and on the construction of this document and on a consideration of the law there is no doubt in my mind that Subbamma intended to reserve to herself a life-estate with full powers over the corpus during her life and that as to whatever property was left the adopted son was to succeed. The appeal, therefore, succeeds and the decree of the Lower Court will be modified accordingly. The 2nd respondent must pay appellant's costs throughout. Appeal as against 2nd defendant is dismissed with costs. Memorandum of objection by 4th defendant is dismissed, no costs. Amendment of plaint ordered by Lower Court will now be formally effected.

Krishnan, J. :—I agree.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE CURGENVEN.

Venna Tatayya ... *Appellant* in both (Petr.-Deft.)*

v.

Kakarla Gangayya ... *Respondent in both (Respt.-Plff.).*

Tatayya v. Gangayya.

Contract Act, S 74—Instalment payments—Decree providing for Default in payment of any of the instalments—Stipulation for payment of entire amount in event of—If a penalty—Whole sum payable in praesenti

A decree incorporating a razinamah between the parties found and declared that a sum of Rs. 30,000 was due by the defendants to the plaintiff. The decree provided that the said amount was to be paid according to instalments agreed upon by the parties, viz, Rs. 4,000 on or before 23rd August, 1925; Rs. 6,600 and odd on or before 23rd August, 1926; and three other instalments payable up to 23rd August 1929. The decree added that "in default of payment of any one of the said instalments, the plaintiff do recover, irrespective of the future instalments, the entire amount of principal and interest that remains outstanding by that date, together with interest at Re 0-10-0 per cent. per month from that date." The Rs. 30,000 carried interest at the same rate as was charged on each of the instalments.

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*C. M. A. Nos. 106 and 107 of 1927. 22nd April, 1927.

9. I. L. R. 46 B. 162.

Held, that the stipulation for payment of the entire amount in default of payment of any of the instalments was not in the nature of a penalty under S. 74 of the Contract Act.

Tatayya v. Gangayya.

Appeals against the order of the Court of the Subordinate Judge of Masulipatam, dated 1st November, 1926, in C. M. P.s Nos. 70 and 1393 respectively of 1926 in O. S. No. 24 of 1924.

M. Patanjali Sastri for appellant.

P. Satyanarayana Rao for respondent.

The Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—This is an appeal against the order of the Subordinate Judge of Masulipatam dismissing the defendant's petition to accord satisfaction *pro tanto* of the first instalment of a razinamah decree passed in O. S. No. 24 of 1924 on the file of the Subordinate Judge of Masulipatam. The decree was made, we are told, in a mortgage suit and incorporated a razinamah by the parties, and the essential parts of it are as follows: "The Court doth hereby order and decree that defendants do pay to the plaintiff according to the following instalments as between themselves fixed, the amount of Rs. 30,447-6-0, together with interest thereon at Re. 0-10-0 per cent. per month from this date, being the balance remaining after deducting the Rs. 2,500 which defendants obtained as remission from the entire amount of this suit and costs together with subsequent interest up to this date." Then the decree proceeds to details of instalments. Rs. 4,000 was payable on or before the 23rd August, 1925; Rs. 6,600 and odd was payable on or before the 23rd August, 1926; and there are three other instalments payable up to the 23rd August, 1929. The decree further proceeds that "in default of payment of any one of the said instalments, the plaintiff do recover, irrespective of the future instalments, the entire amount of principal and interest that remains outstanding by that date, together with interest at Re. 0-10-0 per cent. per month from that date, and together with the costs of warrant, etc."

In the Lower Court the appellant here took various points. He alleged a tender of Rs. 4,000 on the 23rd August, 1925, which he says he could not pay to the decree-holder owing to his absence from his house, that he went next morning with P. Ws. 3 and 4, whereupon the decree-holder observed that default had been made and demanded the payment of the whole amount. After some discussion he agreed to waive the default on condition that the first and second instalments were

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Odgers, J.

both paid within 6 months from that date. Now the only point on this that has been argued before us is that of waiver by the decree-holder on the 24th August, 1925. We have been taken through the evidence of P. Ws. 3 and 4 who assisted in bringing about the original razinamah and we see no reason to disturb the finding of the learned Subordinate Judge that their evidence cannot be accepted. That then is the question of fact.

A question of law has been fully argued before us and that is this; that the transaction must be viewed in the nature of a penalty under S. 74 of the Contract Act, because the contract as contained in the razinamah is to pay Rs. 4,000 on the 23rd of August, 1925, and in default of so doing the whole Rs.30,000 odd becomes due and payable and that this is a penalty and falls within Illustration (*g*) to S. 74. Now I am quite content not to go beyond the terms of the decree and my construction of the decree is that it is an acknowledgment to begin with, that Rs. 30,000 odd is due and payable by the judgment-debtor to the decree-holder and that the agreement to pay by instalments is for the benefit of the judgment-debtor and is really a concession by the decree-holder. If that is so, that is to say, if the sum payable *in praesenti* is Rs. 30,000, that is the liability, and, if the instalments scheme is merely a mode of payment, then, as Mr. Patanjali Sastri frankly admits, the foundation of his case as to the Rs. 30,000 being a penalty is gone. He wishes us to assume that this is wrong and that the liability originates with the payment of each of these various instalments. His contention is that in that case the payment of Rs. 30,000 in default of payment of a sum of Rs. 4,000 is clearly a penalty. Now it is to be observed, distinguishing this case from that in *Ramalinga Adaviar* v. *Meenakshisundaram Pillai* (1) before Srinivasa Aiyangar, J., that in that case the money had not yet become due, that is to say, the instalments of the chit fund amounts were payable in future in respect of a future liability. The learned Judge points out that on his construction of the document in that case there was no present debt created for the whole amount and that the parties agreed that it was only on the due dates that the amounts of the instalments should become due and payable. The learned Judge also says that "the question whether the parties to the contract treated the amounts for which the bond was given as *debita in praesenti* although

1. (1924) 47 M. L. J. 833.

Tatayya v. Gangayya.

Odgers, J.

solvenda in futuro was a question of intention to be gathered from the document itself". The learned Judge comes to the conclusion that in order to constitute a penalty it must be burdensome or oppressive and must operate *in terrorum* over the promisor so as to drive him to fulfil the contract. The learned Judge examined at some length the Illustrations (*f*) and (*g*) to S. 74, Contract Act, and pointed out that the principle underlying Illustration (*f*) is that the whole of the debt being payable immediately, the creditor agrees with the debtor to allow him to pay the amount by instalments so long as he pays them regularly. Now, with great deference, nothing is said in Illustration (*f*) as to the whole of the debt being immediately payable and the learned vakil for the appellant seeks to differentiate the two illustrations by the fact that in this case interest is payable and therefore it falls under Illustration (*g*). But it is to be observed in the present case that the interest is part of the sum payable itself; that is to say, that the Rs. 30,000 carries interest at 7½ per cent. which is exactly the same interest as is charged on each of the instalments; so that it seems to me that the fact that no interest is mentioned in Illustration (*f*)—and it may be somewhat unnatural to suppose that the loan mentioned therein would be one without interest—does not seem to me to make any difference, especially as in (*g*) we have an illustration of what is obviously an unfair bargain which might amount to paying 100 per cent. for the accommodation. So the question resolves itself into this: Does the stipulation that on non-payment of an instalment of the debt due the whole amount is to become payable, constitute a penalty under the section? It seems to me that the authorities are in favour of regarding this as outside the provisions of the section. For instance, in *Wallingford* v. *Mutual Society* (2), it is said by the Lord Chancellor that acceleration of payments is not a penalty. He held that the contract was for certain debts which were owed immediately, though payable in future, and "being such, it is consistent both with principle and with authority to hold, that if the party who ought to have paid them or any of them at the proper time failed to do so, the default was his own and the time might lawfully be accelerated for the other payments which were originally deferred". That is a perfectly general proposition and seems to me to cover the present case. It is also to be remarked that in the case of a contract to pay

2. (1880) 5 A. C. 685.

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Odgers, J.

a given sum of money, the sum named as payable on breach must be a sum in addition to the principal sum due under the contract, whereas in this case the sum payable is only the original amount of the debt as agreed to be due between the parties. And in *Ex parte Burden. In re Neil* (3), a case of a payment of a less amount by instalments provided they were punctually paid, and on a default in payment of the last instalment it was held that the creditor might sue for the balance of the original full amount due. "The debtor must pay that which he would have had to pay if the agreement had never been made," says James, L. J.; and Cotton, L. J., said: "I know of no case in which the equitable doctrine about penalties has been applied to a case in which a creditor agrees to reduce the amount of his claim on certain conditions, but that on the failure of the debtor to fulfil any one of those conditions the original rights of the creditor shall revive, and in my opinion the doctrine ought not to be applied to such a case." We have further a case of the Allahabad High Court in *Kishen Prasad* v. *Kunj Behari* (4) which seems to me to support the view put forward by the learned vakil for the respondents. As pointed out by one of the Judges, "According to the terms of the compromise, therefore, if there was to be a default the plaintiffs were to get nothing more than what was declared to be due to them". It seems to me to be precisely the case here. There is also an observation in a recent Letters Patent Appeal, Nos. 101 and 102 of 1924, which lends support to the same view.

On the best consideration I can give to the matter, I think the balance of authority is distinctly in favour of holding that a stipulation that the whole amount due should be paid on default of a payment of any instalment cannot be held to be in the nature of a penalty within S. 74 of the Contract Act in a case like the present. I therefore would dismiss the appeal with costs.

C. M. A. No. 107 of 1927 is also dismissed with costs.

Curgenven, J.

Curgenven, J. :—I agree with my learned brother upon a construction of the decree, that it finds a sum of Rs. 30,447-6-0 payable by the defendants to the plaintiff on the date on which it was passed and that it further provides for the payment of this sum according to certain instalments and for the alternative that the whole amount still due should be payable upon default.

3. (1881) 16 Ch. D. 675. 4. (1925) 91 I. C. 790.

Tatayya v. Gangayya.

Curgenven, J.

I am unable to accept Mr. Patanjali Sastri's argument that these terms amount to no more than the sums payable as instalments come into existence as debts only at the times when they are payable and not before. One clear argument against that position is that these sums are to bear interest from the date on which the decree itself was passed. In fact, I think that the decree is nothing other than for a sum present and for provision for a certain method of payment by instalments and provision further for default on failure to pay. The question accordingly is whether the acceleration of payment which is to happen upon default is in the nature of a penalty within the terms of S. 74 of the Indian Contract Act. I am prepared to concede that under the express terms of that section it is not very easy to say that a condition of this kind is excluded from its scope, because, in addition to laying down that the penalty may be a sum named in the contract as the amount to be paid in case of breach, it includes also the clause that the contract may contain 'any other stipulation by way of penalty' which is a very wide method of expression. Turning, however, to the illustrations, we are given a contrast in the last two which I think is perhaps intended to set the matter at rest. It is quite clear that the case in illustration (*f*) relates to a mere acceleration and not to the exaction of any extra amount by way of penalty, whereas in Illustration (*g*) the borrower not only has the payment accelerated but he is to pay upon it the interest which was properly due only upon the loan if it had run for its full course. That is the principle upon which these two illustrations have been distinguished by the learned authors Pollock and Mulla in their Commentary on the Indian Contract Act, and it appears to me that that is the clear distinction between them. It is no doubt founded upon English case-law and especially upon the case *Wallingford* v. *Mutual Society* (2). Mr. Patanjali Sastri has endeavoured to distinguish that case on the ground that the debt there was existing throughout and that the grant of instalments for the payment of it was a mere concession which the creditor was entitled to withdraw. Whether or not the similar term in the decree here regarding instalments can be regarded as a concession, I have already expressed my view that the debt must be regarded as existing from the first, and upon this ground I would distinguish this case from that dealt with by Srinivasa Aiyangar, J., in *Ramalinga Adaviar* v. *Meenakshi-*

2. (1880) 5 A C. 685.

Tatayya v. Gangayya.

Curgenven, J.

sundaram Pillai (1) where he draws a distinction from the English case on the ground that the debt he was dealing with came into existence piecemeal as the instalments fell due. Again in *Ex parte Burden. In re Neil* (3) the principle has been enunciated in the judgment of Lush, L. J., that a penalty must be something which a debtor has to pay over and above his original liability as a punishment. The same principle, I think, is apparent as underlying the decision of *Kishen Prasad* v. *Kunj Behari Lal* (4), where it was held that if the agreement provided that, if the payment were not made according to date the plaintiff would be entitled to recover the whole amount claimed by him from the defendant, it cannot be said to contain a penal clause inasmuch as it merely amounts to the withdrawal of a concession; and that in such a case time must be regarded as of the essence of the contract. I would add that in my experience it is no uncommon thing for a decree to be drafted in accordance with the provisions of R. 11 of O. 20, C. P. Code and providing for the payment of the sum due by instalments, with the alternative that upon default the whole amount may be executed for, and I have never heard it said that in such a case this alternative direction can be relieved against as a penalty.

I agree therefore that the appeals must be dismissed with costs.

A. S. V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE CURGENVEN.

Bada Kristam Naidu ... *Appellant** (*Petitioner in E. P. No.* 68 *of* 1916)

v.

Durvada Patrudu *alias* Janakiramayya Chowdhari and others ... *Respondents* (*Respondents and Petitioner in E. P. No.* 39 *of* 1916).

Bada Kristam Naidu v. Durvada Patrudu.

Civil Procedure Code, S 47—Execution of decree—Right of—Benami-dar transferee decree-holder—Death of, after recognition of transfer—Contest after, between his heirs and the real transferee of the decree as to the right to execute the decree—Decision of—Executing Court—Power and duty of.

*C. M. A. No. 141 of 1923 and C. M. S. A. No. 64 of 1923. 3rd May, 1927.

1. (1924) 47 M L J 833. 3. (1881) 16 Ch. D 675.
4. (1925) 91 I. C. 790.

Bada Kristam Naidu v. Duvvada Patrudu.

A decree obtained by *B* was by him transferred to *K*. *K* applied to be brought on record as transferee decree-holder and was so recognised He then died. and the question arose who was entitled to execute the decree. Alleging that *K* was merely a benamidar for his father, *N* applied to execute the decree. Another application was put in by the undivided brother of *K*.

Held, that the executing Court was competent and was bound under S. 47, Civil Procedure Code, to decide which of the two rival petitioners was entitled to execute the decree.

Palaniappa Chettiar v. *Subramania Chettiar,* (1924) I L R 48 M 553 . 48 M L J 419 is no authority for the position that, even after the death of the benamidar transferee decree-holder, the real owner still cannot be heard to say that the decree is his, and that he alone is entitled to execute it.

Appeal against the order of the District Court of Ganjam in E. P. Nos. 39 and 68 of 1916 in O. S. No. 20 of 1904 and Appeal against the order of the Court of the Additional Subordinate Judge of Ganjam at Berhampore in A. S. No. 5 of 1922 (A. S. No. 16 of 1919, District Court of Ganjam) preferred against the order of the Court of the District Munsif of Sompeta in E. P. No. 5430 of 1916 in O. S. No. 483 of 1910.

H. Suryanarayana for appellant.

B. Satyanarayana and *V. Govindarajachari* for respondents.

The Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—This is an appeal against the order of the learned District Judge of Ganjam on two E. Ps namely 39 of 1916 and 68 of 1916.In the former Kamalanabham Naidu was the petitioner as transferee and benamidar of the late Parasuramayya Chowdhari stated to be the real owner of the decree. Kamalanabham Naidu having died, the real owner's undivided son, Nandesam Chowdhari, a minor, represented by his next friend Duvvada Butchamma, was the petitioner, and the respondents were Duvvada Patrudu *alias* Janakiramayya Chowdhari and Duvvada Gusayi Chowdhari. In E. P. No. 68 of 1916 the undivided brother of Kamalanabham Naidu, transferee, is the petitioner and the respondents are the same as in E. P. No.39 of 1916. The learned District Judge, whose predecessor held that the question which of these two rival petitioners can execute the decree is one to be decided under S. 47, Civil Procedure Code, decided on the merits that the brother of Kamalanabham Naidu is not entitled to execute the decree in E. P. No. 68 of 1916 and dismissed the execution petition.

The facts are that in O. S. No. 20 of 1904 a certain Bheemaraju Chetty obtained a decree which he transferred by

Bada Kristam Naidu v. Durvada Patrudu, Odgers, J.

Ex. A to Kamalanabham Naidu. That was on the 25th November, 1906. Kamalanabham Naidu applied to be brought on the record as transferee decree-holder and was so recognised on the 9th March, 1908. In 1914 Kamalanabham Naidu died and the appellant is, as stated, his undivided brother. The petitioner in the other petition is the undivided nephew of the judgment-debtor and a cousin of Kamalanabham Naidu's mother. This petitioner alleges that his father was the real transferee and that Kamalanabham Naidu was only a benamidar for him. It is therefore to be observed that the original parties, *i. e.,* the original transferor and the original alleged benami transferee and the original alleged real transferee are all dead, and the first question is, can a question involving a benami transaction be gone into under S. 47, Civil Procedure Code? It is maintained for the appellant that this has now been decided in *Palaniappa Chettiar* v. *Subramania Chettiar* (1) and that decision must be taken to exclude every possible question of benami that may arise in execution. If that is so, the appellant is right. But the question is, does the decision go to that length? What the decision of the Chief Justice and V. V. Srinivasa Aiyangar, J., amounts to is that, where a decree has been transferred to a person in writing, nobody else can, under colour of being the real owner, apply to have the right of executing the decree conferred on him. In other words, the transfer is conclusive of the right to execute. In that case the assignment of the decree was taken in the personal name of one R. M. M. Subramaniam Chetty and it was attempted to be shown that this gentleman was only an agent with general power from one S. N. Subramania Chetty and that therefore the assignment to R.M.M. Subramania Chetty was simply a benami transaction for the principal. The learned Judge held that O. 21, R. 16 which lays down that where a decree is transferred by an assignment in writing or by operation of law the transferee may apply for execution excluded a person otherwise a stranger to the Court from coming forward alleging that the transferee is a mere benamidar. V. V. Srinivasa Aiyangar, J., observed at the end of his judgment:

"It is also clear that the Code of Civil Procedure did really intend to prevent benamidars coming in and making applications to the Court on the general basis of the law relating to benami transaction."

The case seems to me to amount only to this, namely, that the rights of the transferee to come in are confined unlike those

1. (1924) I L R 48 M 553 : 48 M L J 419.

Bada Kristam Naidu v. Durvada Patrudu.

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of the decree-holder to O. 21, R. 16. This rule has to be read in connection with S. 47 (3) which lays down the procedure to be adopted when an assignee as representing his assignor wants to execute. In further support of his argument the learned vakil for the appellant cited *Paupayya and Subbayya* v. *Narasammah and K. Subbayya* (2) which is a very similar case to *Palaniappa Chettiar* v. *Subramania Chettiar* (1) except that the decision which was disapproved in the later case was to the precisely opposite effect. There Johnston's name appeared on the face of the decree and it was alleged that he had obtained the decree as agent for Arbuthnot and Company. It was held that the decree-holder was the person whose name appeared on the face of the record or had been recognised as transferee. The decision in *Bhandari* v. *Ramachandra* (3) does not appear to help the appellant as in that case there was no decree when the assignment was made. The question really is whether on the death of the assignee, whom we will assume for the present to be benamidar, the question under S. 47 (3) can be re-opened *de novo* and the matter decided as to who is really the representative of the decree-holder. It does not seem to me that the case in *Palaniappa Chettiar* v. *Subramania Chettiar* (1) understood in the way I have set out above affords us any assistance in a matter of this sort unless it can be taken, as I do not think it can, to be a general declaration that no kind of transaction involving the doctrine of benami will be enquired into by the executing Court. If the law really meant that, it would have been quite easy to have inserted a provision in O. 21, R. 16 or in S. 47. There is no question here of going behind the decree because the person named in the decree is dead and the question seems to be to resolve itself into one quite as much to the title of the decree as one involving this question of benami. In fact I would go so far as to say that this question of benami shrinks to very unimportant proportions in a matter of this sort, the question being who is the real owner of this decree which is at present so to speak floating about and without any person authorised to execute it. The right of the real owner to execute the decree is recognised in an earlier case in *Abdul Karim* v. *Chukhun* (4) where the benamidar admitted that a certain sale to him was benami and that the real and beneficial transferee was the father of the applicant for execution on which

1. (1924) I L R 48 M 553 . 48 M L J 419. 2. (1880) I L R 2 M 216.
3. (1906) 17 M L J 391. 4. (1879) 5 Cal. L R 255.

Bada Krishnam Naidu v. Durvada Patnadu. Odgers, J.

the Lower Court allowed the decree to be executed. Mitter, J., in that case observed that the benami system is recognised in this country and a benamidar is not a transferee of the decree, whereas the section only authorised the Court to allow the transferee of the decree to apply for execution. That no doubt has been modified in modern times and benami transactions have been recognised in later decisions as for instance by the Privy Council in *Gur Narayan* v. *Sheolal Singh* (5) holding that a benamidar, though not beneficially interested in property standing in his name, represents in fact the real owner and is, so far as their relative legal position is concerned, a mere trustee for him and is authorised to sue. Sir George Farwell in an earlier case in *Bilas Kunwar* v. *Desraj Ranjit Singh* (6) observed that this system had a resemblance to a resulting trust. If that is so, it seems difficult to say that the title to this decree has not resulted to the appellant by operation of law such as is contemplated by S. 82 of the Trusts Act. It has been argued that, when a benamidar dies he being in the position of a trustee under the Trusts Act and there being no person under S. 73 to appoint a successor to him, his legal representative must assume the benami character which was held by his father or other predecessor. The case in *Raja of Deo* v. *Abdullah* (7) was cited to us for the proposition that a trusteeship did devolve on the late trustee's legal representative. It is based on one sentence at the end of the Privy Council judgment where the facts are extremely complicated. The sentence runs as follows: "Kashinath was a trustee for Rajah Bhikham, and Lajjadhari could only succeed to his father's trusteeship." Kashinath was a benamidar for the Rajah and his son Lajjadhari executed a conveyance acting on the instructions of the Rajah. It can hardly be denied that the Rajah was the true owner and that Lajjadhari had nothing in himself that he could convey. I think that is all their Lordships meant by the sentence in question and that it would be an extraordinary doctrine to lay down that, when a benamidar dies, of necessity the benamidarship is carried on by his relations who happened to be his legal representatives. A benami transaction is, I imagine, generally entered into with one who is personally trusted or personally selected for some reason that commends itself to the transferor and it is extremely unlikely

5. (1918) L R 46 I A 1 : I L R 46 C 566 : 36 M L J 68 (P C).
6. (1915) I L R 37 A 557 · 29 M L J 335 (P C).
7. (1918) L R 45 I A 97 : I L R 45 C 909 : 35 M L J 46 (P C).

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that any benamidarship would be intended to last beyond the life of the person who is interested as benamidar. Various cases were cited to us on behalf of the respondent to show that the death of the benamidar merely removes a bar to the legal as well as the beneficial enjoyment of the property by the beneficiary. For instance, on revocation of probate, in *Umasoondury Dassy* v. *Brojonath Bhuttacharjee* (8) an executrix took out probate and obtained a decree for rent. The probate was revoked by a minor who applied for execution of this decree. The Court held the minor could execute as he had succeeded his father by the operation of law. So in *A. B. Miller* v. *Abinash Chunder Dutt* (9), where the adjudication in insolvency was annulled, it was held that the decree obtained by the Official Assignee was not annulled thereby and that the applicant had become assignee by operation of law as he had been appointed trustee to the estate of the late ex-insolvent. In *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu* (10) promissory notes were taken from the debtors to an estate by the manager under the management of the Court of Wards for the latter. The Court held that they became vested in the mortgagee when the superintendence of the wards was withdrawn. Further *Muthiah Chettiar* v. *Govinddoss Krishnadoss* (11), which was heard by a Bench of three Judges, seems to imply that O. 21, R. 16 is not exhaustive of every case which might come under its provisions. If that is so, it cannot be held that R. 16 is final for all executing purposes. But however that may be, I am of opinion that as a matter of fact R. 16 has little or no application to the present case. It seems to me that by the death of the original parties the whole matter is set at large and that it is the duty of the Court under S. 47 to decide on the merits which of the contestants is in fact entitled to execute this decree. So far then the contention of the appellant must be overruled and I now proceed to the merits of the case. There is no need to say much about these. The evidence of the petitioner's witnesses, four in number, has been printed and we have been taken through it. The Judge who saw and heard the evidence relied upon all these witnesses and it seems to me that in particular if P. W. 1's evidence is accepted the appellant is out of Court. In fact it was hardly suggested otherwise. P. W. 1 in answer to the Court says that Parasuramayya suggested to the witness that the transfer should be in Kamalanabham's name

8. (1889) I L R 16 C 347. 9. (1900) 4 C W N 785.
10. (1908) I L R 31 M 534. 11. (1921) I L R 44 M 919 41 M L J 316

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benami for him; and also that Parasuramayya suggested that Kamalanabham should be "shown as the transferee" as the judgment-debtor was his own brother. The witness could not say who actually paid the money. But there seems to be from the evidence no doubt that the money was provided by Parasuramayya, he and Kamalanabham having settled to make the transfer for about half the decree amount, namely Rs. 9,200. This appears to be probablised by the evidence of P. W. 2 who said that just at the time Patrudu Chowdhari was preparing a fresh suit for partition as the High Court had dismissed his previous suit on a preliminary point. P. W. 3 says that he is sure that Parasuramayya provided the money and I do not think there is any point to be made of his previous statement in 1908 that the consideration was paid by Kamalanabham because in his present statement he says he is not sure who actually handed over the money but that if he said that Kamalanabam did it in 1908 it is probably right. There is in my opinion no reason to think that the learned District Judge came to a wrong conclusion on the merits and as I am against the appellant also on the point of law this Civil Miscellaneous Appeal must be dismissed with costs.

C. M. S. A. No. 64 of 1923 will also be dismissed.

Curgenven, J.

Curgenven, J. :—Following *Palaniappa Chettiar* v. *Subramania Chettiar* (1) it is no doubt true that the real owner of a decree cannot claim under O. 21, R. 16 to execute it where it has been transferred in writing to the name of a *benamidar* for him. But once the benamidar is dead, this decision does not appear to me to be any authority for the position pressed upon us that the real owner still cannot be heard to say that the decree is his; nor I think have we been shown any other authority for the proposition. Once the benamidar is dead, the question necessarily arises, who is his representative, or, to use the language of O. 21, R. 16, who is his transferee by operation of law? In the ascertainment of this, there does not appear to be any provision in the Code, or any other authority, requiring the executing Court to exclude the real owner from coming forward and proving that the decree is his property. We have been shown nothing in support of the contention that, in such circumstances, the ostensible owner is to be regarded as the real owner for the purpose of ascertaining his representatives. There is a series

1. (1924) I L R 48 M 553: 48 M L J 419.

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of cases *Umasoondury Dassy* v. *Brojonath Bhuttacharjee* (8), *A. B. Miller* v. *Abinash Chunder Dutt* (9) and *Sowcar Lodd Govinda Doss* v. *Muneppa Naidu* (10) in support of the view that, when the title of the holder of a decree or of a transferred decree terminates, when, for instance, the holder is an executor and probate is revoked, when he is a trustee under a trust found to be invalid, when he is an Official Receiver and the adjudication is annulled, the owner upon whom the title devolves may be substituted by the executing Court. That Court is clearly bound under S. 47 (3), C. P. Code, to determine who, in this wide sense of the term, is the decree-holder's representative. To quote Mukerjee J., in *Ajodhya Roy* v. *Hardwar Roy* (12) "the term 'representative' as used in S. 244 of the Code of Civil Procedure of 1882 means not merely the legal representative in the sense of the heir, executor or administrator, but includes any representative in interest, that is, any transferee of the interest of the decree-holder........"

The further question then is whether, when a benamidar dies, the real owner is his representative or transferee by operation of law. Some argument has been addressed to us to show that the benamidar was in the position of a trustee, and that, upon the death of a trustee and until another trustee is appointed, his natural heir succeeds to the trust. That may be true of a trust created under the Trusts Act, but I do not think that an ordinary *benami* title is governed by this rule. If the real owner sued to establish his title to the property, it is indisputable that he would be entitled to a decree declaring it, and, if that be so, he may equally establish his title in proceedings under S. 47, C. P. Code. In my view, therefore, the Lower Court was right in deeming itself competent to go into this question.

On the merits it appears to me that there is a good deal of substance in the argument that Parasuramayya had considerable motive for desiring to acquire this decree whereas it would have been a foolhardy action on the part of the benamidar Kamalanabham. The circumstances are sufficiently explained by one of the vakils, P. W. 2, namely, that Parasuramayya himself owned only 4|5ths of the property and that the remaining 1|5th was under litigation between him and his brother. It was natural in those circumstances that Parasuramayya should desire to acquire the decree held by his brother's mortgagee. The evidence relating to the sources from which the money was

8. (1889) I. L. R. 16 C. 347.
9. (1900) 4 C W N 785.
10. (1908) I L R 31 M 534. 12. (1909) 9 C L J 485.

Bada Kristam Naidu v. Duryada Patrudu.

Curgenven, J.

obtained is not in itself extremely cogent but if the evidence of the vakil P. W. 1 is accepted it is conclusive upon the question of benami, because he says that the parties clearly and unambiguously gave him to understand that that was the nature of the transaction. It is true that a considerable interval, some 16 years, elapsed between that transaction and the date of his deposition, but that is not a reason for rejecting his evidence. There is further the testimony of the attestors P. Ws. 3 and 4. It is said that P. W. 3's evidence is to be considerably discounted by the circumstance that he said in Exhibit II Kamalanabham paid the money. But granting that the transfer was a benami transaction, and he desired to speak in support of it, he could have said nothing else.

The learned District Judge has pointed out that the alleged benamidar never during the course of the 8 years that he lived after acquiring the decree attempted to execute it and in view of this consideration and other considerations which I have mentioned I think the District Judge was clearly right in holding that it was a benami transaction. I agree accordingly with the orders proposed by my learned brother.

A. S. V. *Appeals dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT :—LORD PHILLIMORE, LORD SINHA, LORD BLANESBURGH AND SIR LANCELOT SANDERSON.

Maharaja Bahadur Keshava Prasad Singh ... *Appellant**

v.

The Secretary of State for India in Council ... *Respondent.*

P. C.

Maharaja Bahadur Keshava Prasad Singh v. Secretary of State for India.

Alluvion—Gradual accretion—Reformation in situ—*Rights of riparian owners—Bengal Reg XI of* 1825, *S.* 4.

Land which by fluvial action has gradually accreted to that of a riparian owner does not become his property under Bengal Reg. XI of 1825, S. 4, if it is a reformation on the site of diluviated land of another owner, who has neither given up his right to it nor let adverse possession run. This principle applies whether the land of the two owners was originally on the same or on the opposite side of the river.

Lopez v. *Muddun Mohun Thakoor,* (1870) 13 M I A 467, 475, *Nursinhat Singh* v. *Looti Ali Khan,* (1874) L. R. 2 I. A. 28; and *Sardar Jaggot Singh* v. *Brijnath Kunwar,* (1900) I. L. R. 27 Cal. 768 · 27 I A 81 followed.

Rughoobur Dyal Sahoo v. *Kishen Pertab Sahee,* (1879) L R 6 I. A. 211 distinguished.

Judgment of the High Court affirmed.

*P. C. Appeal No. 37 of 1925. 25th February, 1927.

P. C.
Maharaja Bahadur Keshava Prasad Singh v. Secretary of State for India

Appeal from a decree of the Patna High Court affirming a decree of the District Judge, Shahabad.

The material facts appear in the judgment reported below.

De Gruyther, K. C. and *E. B. Raikes* for appellant.—The accretion was gained by gradual accession within the meaning of Reg. XI of 1825, S. 4, cl. (1). *Secretary of State* v. *Raja of Visianagaram* (1). A good title was thus obtained. Reliance was placed on *Rughoobur Dyal Sahoo* v. *Kishen Pertab Sahee* (2); *Doe* v. *East India Co.* (3); *Eckowrie Singh* v. *Heeraloll Seal* (4); *Nogender Chunder Ghose* v. *Mahomed Esof* (5); and *Bahusu Ramalakshmamma* v. *Collector of Godavari* (6). The case of *Lopez* v. *Muddun Mohun Thakoor* (7) is not consistent with other Privy Council rulings.

We rely alternatively on S. 4, cl. (5) of the Regulation, and submit a title was obtained on the principle recognized there: *Attorney-General* v. *McCarthy* (8); *Hinton* v. *Ashby* (9); *Mayor of Carlisle* v. *Graham* (10); and *Foster* v. *Wright* (11).

As to custom this we submit was proved. The evidence was as in *Dhanj* v. *Gangananda Singh* (12).

Assuming a good title in the appellant the sale was invalid since there was no assessment, but if no title the sale was likewise invalid since the Collector had no jurisdiction to sell the land to recover arrears due in a different district: *Balkishen Das* v. *Simpson* (13). Plaintiff since he sued in ejectment had to establish his title.

Dunne, K. C. and *Kenworthy Brown* for respondent (were not called on as to the validity of the sale if a title was not established by the appellant). The finding was one of reformation *in situ*. The observation in *Lopez's* case (7) relied on was a material part of the decision. The rule being a decision as to the true construction of the Regulation it applies whether the lands were on one side or opposite each other. The rule has

1. (1921) L R 49 I A 67 : I L R 45 M 207 : 42 M L J 589 (P C).
2. (1879) L R 6 I A 211
3. (1856) 6 M I A 267.
4. (1868) 12 M I A 136.
5. (1872) 10 Ben. L R 406 (P C).
6. (1899) L R 26 I A 107 · I L R 22 M 464 (P C).
7. (1870) 13 M I A 467, 475.
8. (1911) 2 I R 260
9. (1896) 2 Ch. 1.
10. (1869) L R 4 Ex. 361.
11. (1878) 4 C P D 439.
12. (1925) L R 52 I A 279 : I L R 4 Pat 788 : 50 M L J 194 (P C).
13. (1898) L R 25 I A 151 : I L R 25 C 833 (P C).

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been frequently affirmed: *Hursuhai Singh* v. *Lootf Ali Khan* (14); *Sardar Jaggot Singh* v. *Brij Nath Kunwar* (15). We submit that *Ritraj Koer* v. *Sarfaraz Koer* (16) is in no way inconsistent with *Lopez's* case (7). The following were also cited: *Court of Wards* v. *Radha Prosad Singh* (17); *Collector of Rajshahye* v. *Soonduree Debia* (18); *Sarat Sundari Debya* v. *Soorjya Kant Acharjya* (19).

In India fluvial action is of a different character to that in England and English law should not be applied.

The previous decisions of the Board apply irrespective of the claim being made under one or other of the clauses of the 4th section.

Custom as alleged was not proved as the concurrent findings show. Appellant had denied the custom at other times. Reference was made to a previous suit reported in (1919) 5 Pat. L. J. 1, 10.

We concede the sale would be invalid if the appellant acquired a title by accretion.

De Gruyther, K. C. replied.

25th February, 1927. The Judgment of their Lordships was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON :—This is an appeal by the Maharaja of Dumraon, who was the defendant in the suit, against a decree of a Division Bench of the High Court of Judicature at Patna, dated the 1st June, 1923.

The suit was brought by the Secretary of State for India in Council to obtain a declaration of the plaintiff's title to certain lands called the Mahal of Turk Ballia, to recover possession of the said lands from the Maharaja, and for mesne profits.

The suit was tried by the learned District Judge of Shahabad, who made a decree in favour of the plaintiff dated the 19th December, 1918. The High Court, by the above-mentioned decree of 1st June, 1923, dismissed the Maharaja's appeal with costs.

The River Ganges separates the Shahabad district in Bihar from the United Provinces of Agra and Oudh. The

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7. (1870) 13 M I A 467.
14. (1874) L R 2 I A 28.
15. (1900) L R 27 I A 81 : I L R 27 C 768 (P C).
16. (1905) L R 32 I A 165 : I L R 27 A 655 . 15 M L J 349 (P C).
17. (1874) 22 W. R. 238. 18. (1874) 22 W. R. 324.
19. (1876) 25 W. R. 242 (P. C.).

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Sir Lancelot Sanderson.

Ballia district is to the north of the Ganges and the Shahabad district is to the south of the river.

The Mahal Turk Ballia, which consists of a single mouzah of that name, was settled with proprietors, other than the appellant, in the year 1790 as a separate estate, and in 1793 or 1795 was permanently settled and assessed to revenue at Rs. 251. It had a nominal area of 275 bighas, and at that time was situated to the north of the River Ganges.

Between 1871 and 1884 the land of this village was washed away by the Ganges, which was gradually moving northwards, until in 1884 the whole of the village had disappeared.

As the land of this estate became submerged in the river, proportionate remission of revenue was allowed, until at last the proprietors were paying a nominal sum of Rs. 2 per annum in order to preserve their right to the estate in the event of its reappearing. In 1884, however, they were informed by the authorities that this payment was no longer necessary to keep alive their rights, and the Board of Revenue in the United Provinces directed that the payment of revenue should be suspended and written off from year to year in the revenue account. This was accordingly done in the revenue accounts of the collectorate.

As the river altered its position to the northward, accretions took place on the opposite bank in the Shahabad district, and in 1909 correspondence took place between the respective collectors, from which it appeared that Turk Ballia had reformed on the south side of the river.

Accordingly, by two notices issued in the Gazettes of the respective provinces, dated the 25th and 26th May, 1910, it was formally notified that the permanently settled estate of Turk Ballia had ceased to form part of the Ballia district in the United Provinces, and that it formed part of the Shahabad district in Bengal (which at that time included Bihar) in respect of its civil, criminal and revenue jurisdiction.

It is not clear when the Mahal of Turk Ballia began to appear as dry land on the south side of the river. It would, in the natural course of things, be difficult to ascertain this with any accuracy; the learned Judges of the High Court stated that there could be little doubt that for some years after it emerged, as the river subsided after the floods, it would be again covered during the rainy season, and that it might rea-

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sonably be inferred that for some time after its emergence it would be sandy waste unfit for cultivation.

The learned Judge who tried the suit held on the evidence that it did not become cultivable before 1909, and the learned Judges of the High Court agreed with that finding. The above-mentioned date is material to the question whether the Maharaja had acquired a title by adverse possession as against the recorded proprietors when the suit was instituted, viz., on the 8th December, 1916.

This question may be disposed of at once; the High Court held that no title was acquired by the appellant by adverse possession up to the date when the suit was brought, thus affirming the finding of the Trial Court. The learned counsel who appeared for the appellant on this appeal stated during the argument that he accepted the two findings in this respect, and did not dispute them. Their Lordships see no reason for differing from the above-mentioned findings as to adverse possession.

The village of Turk Ballia having been placed on the rent-roll of the Collector of Shahabad, as appears from paragraph 7 of the appellant's case, notices were given to the original proprietors to pay the arrears of revenue alleged to be due in respect of the said estate.

It further appears that no revenue from this estate was paid up to the end of the financial year 1910-1911; and on the 4th May, 1911, when the revenue was in arrear for one year, notification for the sale of the Mahal of Turk Ballia for arrears of revenue was issued under the provisions of Act XI of 1859. The Turk Ballia estate was put up for auction, and in the absence of bidders it was duly purchased by the Collector on behalf of the Government.

The Collector of Shahabad then began relaying the boundaries of Turk Ballia under the Survey Act, on the basis of the maps of the Revenue Survey and the Diara Survey.

The defendant Maharaja, who was in possession of the lands in suit, objected to the demarcation, and claimed the land as an accretion to his own estate. He refused to give up possession, with the result that this suit was instituted, as already stated, on the 8th December, 1916, by the Secretary of State for India in Council.

The Maharaja's estates in the locality lie mainly on the south side of the river. As the new land formed on the

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southern side of the river, the Maharaja had treated it as a portion of his property. . . .

As the learned Judge, who tried the suit, pointed out, if this land was an accretion to the property of the Maharaja, it would ordinarily have been liable to assessment of land revenue under Act IX of 1847. But the Maharaja claimed special privileges in respect of alluvial accretions.

The bulk of the estates which form the Maharaja's zemindari were permanently settled at the decennial settlement of 1789-90, which was confirmed by Regulation I of 1793. This included the estate of Dhakaich Mahal, and in connection with this estate there was a condition agreed to that the Maharaja's predecessor should not claim abatement of revenue for losses by diluvion and he should not be liable to additional assessment on account of alluvial accretions.

To the north of the Dhakaich Mahal, between this estate and the Ganges, were certain villages, not included in the settlement of 1790, which were either waste or uncultivable, or partly or wholly submerged. These villages were settled with the Maharaja in 1800, and form part of the Jauhi Mahal, and include the villages of Jagdishpur and Parsanpa.

It was as alluvial accretions to these two villages that the Maharaja entered into possession of the lands in suit, as parts of it became fit for cultivation.

It was argued on behalf of the appellant before their Lordships that if the appellant acquired a good title to the lands in suit by reason of their gradual accession to his other lands, it would be necessary for the authorities to assess the accreted land under Act IX of 1847 before revenue could be levied in respect thereof, that as this was not done, the Maharaja could not be said to be in default of payment of revenue, and that consequently the sale was without jurisdiction and was invalid.

The learned counsel argued, therefore, that he need not rely on the settlements of 1790 and 1800, inasmuch as his case was that the Maharaja was the proprietor of the accreted land and that he had not been assessed in respect thereof.

Their Lordships agree with this part of the learned counsel's argument, and are of opinion that if it could be shown that the Maharaja had become the proprietor of the lands in suit by reason of their gradual accession to his other lands, a fresh assessment of such accreted lands under Act IX of 1847 would be necessary before the Maharaja could be called upon to pay revenue in respect of such accreted lands.

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The learned Judges of the High Court seem to have thought that the appeal mainly depended upon the construction of the terms of the settlements of 1790 and 1800. Their Lordships are unable to accept that view for the reasons already stated.

The learned Judges of the High Court came to a further conclusion, as follows:—

"Having already determined that the settlement of 1800 does not include the lands now in suit, and assuming that the lands never reverted to the Crown by abandonment, it becomes unnecessary to consider whether the appellant has acquired any proprietary interest in the lands or not."

Their Lordships are not able to agree with this conclusion.

The main point argued before their Lordships on behalf of the appellant was that the Maharaja had obtained a good title to the lands in suit by reason of their gradual accession to his estate to the south of the Ganges by reason of the recess of the river to the northward, and their Lordships agree that this is the principal question in the case.

It raises an important issue which goes to the root of the case, and, in their Lordships' opinion, a decision in respect thereof is essential to the disposal of the appeal.

The argument of the learned counsel on behalf of the appellant in respect of the last-mentioned submission—viz., that the Maharaja had obtained a good title to the lands in suit by reason of their gradual accession to his estate on the south side of the river—was based upon the provisions of Regulation XI of 1825, Section 4, clause (1). The clause is as follows :—

IV.—*First*. When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered an increment to the tenure of the person to whose land or estate it is thus annexed, whether such land or estate be held immediately from Government by a zemindar or other superior landholder, or as a subordinate tenure, by any description of under-tenant whatever. Provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed, and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation II, 1819, or of any other Regulation in force. Nor if annexed to a subordinate tenure held under a superior landholder, shall the under-tenant, whether a khoodkast ryot, holding a mouroosee istimraree tenure at a fixed rate of rent per bigha, or any other description of under-tenant liable by his engagements, or by established usage, to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be justly liable.

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It was urged on behalf of the appellant that the abovementioned clause was applicable to the facts of this case.

Before considering this question it is necessary to mention certain findings of fact of the learned District Judge who tried the suit :—

1. The learned Judge found that the Mahal Turk Ballia, which originally lay on the north side of the river, was washed away to a depth of 80 or 100 yards in a year; that the erosion was slow and gradual in a limited sense, in that it operated by degrees upon the face of the bank ; that it could not be called imperceptible.

2. The learned Judge found that the process of alluvion by which the land in suit was formed on the south side of the river was slow, gradual and imperceptible.

3. He held that it was hardly open to question that the land in suit stands on the site formerly occupied by the Mouzah Turk Ballia; that is to say, though Turk Ballia formerly lay on the north of the Ganges and the land in suit lies on the south of the river, this land lies in the same geographical position, in the same latitude and longitude as that which was originally occupied by Turk Ballia.

These findings were adopted by the learned Judges of the High Court, and in the argument before their Lordships, they were not contested.

It was argued on behalf of the plaintiff (respondent) that, inasmuch as the lands in suit had been identified as the Mahal Turk Ballia, and inasmuch as this was a case of "re-formation *in situ*," the first clause of S. 4 of Regulation XI of 1825 did not apply, but that the fifth clause was applicable and that by general principles of equity and justice it should not be held that the Maharaja was the proprietor of the lands in suit.

The terms of the first clause of S. 4, taken literally and by themselves, may be said to be sufficiently wide and general to include the facts of this case, but the clause has been the subject of judicial decisions, some of them by the Judicial Committee, which appear to their Lordships to place a limitation upon the application of the first clause.

A large number of cases were referred to during the course of the argument, and these have been fully considered; their Lordships, however, do not think it necessary to refer to all the cases, and they are of opinion that it will be sufficient to mention the following:—

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In *Lopez* v. *Muddun Mohun Thakoor* (1) it appeared that land forming part of a mouzah on the banks of the Ganges, by reason of continual encroachments of that river became submerged, the surface soil being wholly washed away. After recession and re-encroachment by the river the waters ultimately subsided and left the land re-formed on its original site. It was held by the Judicial Committee, applying the principles of English law and following *Mussumat Imam Bandi* v. *Hurgovind Ghose* (2) that the land washed away and afterwards re-formed on the old ascertained site was not land gained by increment within the meaning of S. 4 of the Bengal Regulation XI of 1825. Their Lordships' judgment in that case in the first place stated the rule of English law, and it was noted that it is not a principle peculiar to any system of municipal law, but that it is a principle founded in universal law and justice. It was then mentioned that the principle of law so far as relates to accretions had to some extent been made part of the positive written law of India.

Their Lordships then referred to Reguation XI of 1825. S. 4, cl. (1), and proceeded as follows:—

"It is to be observed, however, that the clause refers simply to cases of gain, of acquisition by means of gradual accession. There are no words which imply the confiscation or destruction of any private person's property whatever. If a Regulation is to be construed as taking away anybody's property, that intention to take away ought to be expressed in very plain words, or be made out by very plain and necessary implication......

"It would certainly seem that something more than mere reference to the acquisition of land by increment, by alluvion, or by what other term may be used, would be required in order to enable the owner of one property to take property which had been legally vested in another. In truth, when the whole words are looked at, not merely of that clause but of the whole Regulation, it is quite obvious that what the then Legislative authority was dealing with was the gain which an individual proprietor might make in this way from that which was part of the public territory, the public domain not usable in the ordinary sense—that is to say, the sea belonging to the State, a public river belonging to the State; this was a gift to an individual whose estate lay upon the river or lay upon the sea, a gift to him of that which by accretion became valuable and usable out of that which was in a state of nature neither valuable nor usable."

That decision was given in the year 1870, but the principle had been stated in 1862 by Sir B. Peacock in *Ramanath Thakore* v. *Chundernarain Chowdhury* (3).

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1. (1870) 13 M I A 467.
2. (1848) 4 M I A 403.
3. (1862) 1 Marshall 136.

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The head-note in the last-mentioned case is as follows:—

"Lands washed away and afterwards re-formed upon the old site, which can be clearly recognised, are not lands 'gained' within the meaning of S. 4, Regulation XI of 1825; they do not become the property of the adjoining owner, but remain the property of the original owner."

Sir Barnes Peacock, in giving judgment, is reported to have said:—

"We are of opinion that the word 'gained' in S. 4 of Regulation XI of 1825 does not extend to cases of land washed away and afterwards re-formed upon the old site, which can be clearly recognised.. .. In such a case we think the land-formed by accretion on the old recognised site remains the property of the owner of the original site......

"The principle is that where the accretion can be clearly recognised as having been re-formed on that which formerly belonged to a known proprietor, it shall remain the property of the original owner."

The decision in *Ramanath* v. *Chundernarain Chowdhury* (3) was approved by their Lordships of the Judicial Committee in *Lopez* v. *Muddun Mohun Thakoor* (1).

It was conceded by learned counsel for the appellant that the decision in *Lopez's case* (1) was correct, having regard to the facts of that case; and it was not denied that if, in the present case, after the mahal Turk Ballia has been wholly submerged, the river had receded to the south and the land had re-formed on the ascertained original site of Turk Ballia, and if such site lay to the north of the river, the land so re-formed would belong to the original proprietors.

It was argued, however, that this principle did not apply when the question arose between two riparian owners, who owned property on either side of the river, and when the land was washed away from one side of the river and re-formed on the other side, even though it was re-formed on the old ascertained site.

Their Lordships are unable to see why the principle should apply in the one case and should not apply in the other.

There is no doubt in this case that the land re-formed on the old ascertained site of Turk Ballia. If the river had receded to the south and had left the land re-formed on the site of Turk Ballia on the north side of the river, it would undoubtedly have belonged to the original proprietors; but as the river receded towards the north and left the land re-formed on the old ascertained site of Turk Ballia on the south side of the river, it was argued that the proprietors

1 (1870) 13 M I A 467 at 476. 3. (1862) 1 Marshall 136.

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had lost their property, and that it belonged to the appellant Maharaja by reason of gradual accession.

Their Lordships are not prepared to accept that argument, and are of opinion that the principle laid down in the two above-mentioned cases applies to the facts of the present case.

Their Lordships are confirmed in this opinion by several later decisions to which it is desirable to draw attention.

In *Nogender Chunder Ghose* v. *Mahomed Esof* (4) their Lordships of the Privy Council in 1872 again had to consider Regulation XI of 1825. They discussed the different sections of the Regulation, and stated that—

"Two observations arise on this statute :

"(1) There is nothing to show that the first rule contemplates land other than that which commonly falls within the definition of 'alluvion,' viz., land gained by gradual and unperceptible accretion, the *incrementum latens* of the civil law.

"(2) No express provision is made for the case of land which has been lost to the original proprietor by the encroachment of the sea or a river, and which after diluviation, reappears on the recession of the sea or river. But, on the other hand, there is nothing to take away or destroy the right of the original proprietor in such a case; which must, therefore, be determined by 'the general principles of equity or justice' under the 5th Rule. That the right of the proprietor in the case last put exists and is recognised by law in India, is established by at least two cases decided at this Board."

It was further stated by their Lordships that—

"It is not easy to see upon what principle a title to alluvion by gradual accretion should prevail against the original ownership established by identification of site; unless it be that where the accretion is so gradual as to be latent and imperceptible during its progress, the law, on grounds of convenience, presumes incontrovertibly that no other ownership can be shown to exist and so bars enquiry."

The case of *Hursuhai Singh* v. *Lootf Ali Khan* (5) is on the same lines, and was decided in 1874.

It is important both on account of the facts of the case and on account of the decision thereon. The suit was brought by the appellants, the proprietors of the Mouzah Muteor, in Tirhoot, against the respondents, the proprietors of Mouzah Ramnuggur, to recover the possession of a large quantity of land which had been submerged by the River Ganges. It appears that the river flowed between the estates of the plaintiffs and the defendants, and in its course between the two estates there were from time to time various changes. There were two or three

4. (1872) 10 Ben. L. R. 406 (P. C.). 5. (1874) L R 2 I A 28.

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defined channels, which at times the river overflowed and formed a pool or lake.

The land which was the subject of the suit was submerged, and when it first became free from water and reappeared, in the view which their Lordships took of the facts, it adhered to and adjoined the estate of Ramnuggur, and "*prima facie* the accretion was to that estate." But upon enquiry made by the Judge of Patna, who went to the spot, heard evidence and took great pains to survey the district, he came to the conclusion that the submerged land, although it had re-formed close to Mouzah Ramnuggur, was, in point of fact, land which belonged to Mouzah Muteor, and that there were means by which he could identify, and did identify, the land as having been before its diluviation part of that mouzah.

Two points should be noted about this case: (1) The river ran between the estates of the plaintiffs and the defendants; (2) when the land became free from water and reappeared, it adhered to and adjoined the estate of Ramnuggur (*i.e.*, the defendants' estate), and, to use the words of their Lordships, "*prima facie* the accretion was to that estate."

Their Lordships, however, held, on the authority of *Lopez* v. *Muddun Mohun Thakoor* (1), that where land which has been submerged re-forms and can be identified as having formed part of a particular estate, the owner of that estate is entitled to it.

Their Lordships accordingly allowed the appeal and restored the decree originally made by the Judge of Patna, which was to the effect that the plaintiffs (appellants) were entitled to the lands.

In *Sarat Sundari Debya* v. *Soorjya Kant Acharjya* (6) (decided in 1876) the head-note is as follows:—

"Where land re-forms by alluvion on a site capable of identification, the right of the owner of the original site to the chur is indisputable."

This case, which is another decision of the Judicial Committee, is material, because the plaintiff sought to establish his title on the ground that the land had, in consequence of the recession of the River Jamoona and by gradual accretion, become part of the village of Juggatpoora, which formed part of his zemindari.

The plaintiff failed in his suit because it was found that the land claimed by him was a re-formation upon land which

1. (1870) 13 M I A 467. 6. (1876) 25 W R 242.

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belonged to the defendants, and it was pointed out that even if the defendants had been plaintiffs and could make out that the land claimed was a re-formation upon land which had belonged to them, they would be entitled to recover it from a party in possession.

In *Radha Proshad Singh* v. *Ram Coomar Singh* (7) (decided by the Judicial Committee in 1877) the doctrine in *Lopez's* case was accepted, but it was held that it did not apply to lands in which after their re-formation an indefeasible title had been acquired by long adverse possession or otherwise. The judgment is important, because at page 800 their Lordships are reported to have said:—

"The doctrine in *Lopez's* case was doubtless in favour of the defendants in both suits; and if they had in no way lost their rights, would give them a title to the land re-formed upon sites identified by the thakbust proceedings of 1864 as within the boundaries of their original mouzahs, which would *prima facie* override a title founded on the principle of the acquisition of that land by the proprietor of the northern bank of the Ganges by means of gradual accretion. Their Lordships conceive, however, that the doctrine in *Lopez's* case cannot be taken to apply to land in which, by long adverse possession or otherwise, another party has acquired an indefeasible title."

In *Sardar Jaggot Singh* v. *Brij Nath Kunwar* (8) (decided in 1900) it was held by their Lordships of the Judicial Committee that land submerged by the wanderings of a river from its course and afterwards re-emerging in a form capable of being identified, does not cease to belong to its original owner. The adjoining proprietor cannot make title to it either under sub-section (1) or sub-section (5) of Regulation XI of 1825, S. 4, or on any known principle.

Lord Robertson, in giving judgment, said :

"It is perfectly plain that neither the specific provision of the first sub-section nor the general principles of equity and justice lend the slightest support to the pretension of the appellant, which is to land that would be gained not from the river but from a neighbour"

Their Lordships are of opinion, in view of the principles adopted in the above-mentioned decisions, and in view of the above-mentioned findings of fact, especially the finding that the lands in suit, which appeared on the south side of the river, occupied the site whereon Turk Ballia stood before it was submerged, that the lands did not become part of the Maharaja's estate, and that the Maharaja did not obtain title thereto under the provisions of S. 4, cl. (1) of Regulation XI of 1825, but

7. (1877) I L R 3 C 796.
8. (1900) L R 27 I A 81 : I L R 27 C 768 (P. C.)

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that the title to the land remained in the original proprietors of Turk Ballia. Subject to the question of custom, which is dealt with hereafter, they are further of opinion that it would not be in accordance with general principles of equity and justice to hold that the lands belonged to the Maharaja.

Their Lordships, therefore, are of opinion that the learned District Judge's conclusion on this part of the case was correct.

Much reliance was placed by the learned counsel appearing on behalf of the appellant upon the case of *Rughoobur Dyal Sahoo* v. *Kishen Pertab Sahee* (9).

Their Lordships are of opinion that the question, which is directly in issue in the present case, was not raised in the above-cited case.

In the cited case the two principles, upon which the determination of the Board of Revenue was based, were the existence of an alleged usage, and the inference that by reason of that usage the antecedent interest of the plaintiffs and their predecessors in the land was only of a limited, temporary, and conditional character. Their Lordships of the Judicial Committee held that the trial of the cause had been unfortunate, inasmuch as it failed to determine the substantial question (*see* page 216); hence the remand and the further trial which was directed.

When the case came before the Judicial Committee the second time, on appeal from the High Court, it appeared that the High Court had based their decision on a finding that the settlements made with the plaintiffs were temporary settlements, and were made on the basis that the River Gunduck was the boundary line not only of the two Zillahs Sarun and Tirhoot, but of the estates appertaining to these districts; that the land in dispute was settled with the plaintiffs on temporary leases, and that those settlements were of a limited and temporary character, and that, such being the case, the finding was fatal to the plaintiffs' suit. It was assumed that the accretion belonged to the plaintiffs by virtue of the first clause of S. 4 of Regulation XI of 1825, and it hardly could have been otherwise, because the contention of the defendants was that the title of the land depended upon the course of the river. Their Lordships then proceeded to direct their attention to the question whether the settlements with the plaintiffs were of a temporary character. Their Lordships held that the interest

9. (1879) L R 6 I A 211.

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of the plaintiffs was not temporary but permanent, though the assessments were merely temporary, and that the real question was whether there was a clear and established usage that the river should be the constant boundary between the zemindaris on either side. Their conclusion was that the plaintiffs were during twenty years in occupation of the land, when at the expiration of the settlement of 1847, in consequence of a sudden turn of the River Gunduck, it was on the southern side of the river, capable of being identified; that it still belonged to the plaintiffs unless there was a clear and definite usage that the River Gunduck was the boundary not only between the two districts but also between the zemindaris on either side. It was held that such a custom or usage was not found ever to have existed. Their Lordships accordingly reversed the decree of the High Court and declared that the plaintiffs were entitled to the land in dispute. It is not clear that the defendants were relying on the 1790 settlement as giving them any present right, but rather as a historical event, for the purpose of showing that they were right in their contention that the boundary between the two estates was the main channel of the River Gunduck. In fact, it appears that in order to get rid of the plaintiffs' contention that they had a good title by reason of the settlements of 1837 and 1847, the defendants argued that the proprietary right in the soil might have all along remained in the Government, and that the settlements with the plaintiffs were merely temporary. Their Lordships do not find in the last-cited case anything conflicting with the principles upon which the afore-mentioned decisions of the Judicial Committee were based.

It was next argued on behalf of the Maharaja that he had title to the lands in suit by reason of an alleged immemorial custom in the locality in question, by which land adhering by gradual alluvion to a riparian village becomes a part of the estate to which it accretes.

As the learned District Judge pointed out, the evidence called for the defendant was directed to show that there was a custom by which accretions to the Shahabad side vested in the Shahabad zemindar, viz., the Maharaja.

The first thing to be noted is that the custom which the Maharaja by his witnesses attempted to prove was not the custom pleaded.

The pleading alleged that according to immemorial custom and usage prevailing in the locality, the deep stream of the

Ganges is the boundary of the riparian estates, and consequently all accretions to an estate by that local custom as well as by the law governing accretions become a part and parcel of the estate to which accretions have formed.

It would be sufficient for their Lordships to leave the matter there, but as their Lordships have come to a clear conclusion on the merits of this question, they consider that it is desirable to state it.

The learned District Judge found that no custom as alleged had been proved to exist. The learned Judges of the High Court on appeal stated that they would be prepared to accept the findings of fact arrived at by the learned Judge, but having already determined that the settlement of 1800 did not include the lands in suit, and assuming that the lands never reverted to the Crown, it became unnecessary to consider whether the appellant acquired any proprietary interest in the lands or not.

It might be argued that this was a concurrent finding of fact, but however that may be, their Lordships are of opinion that the learned District Judge's finding in this respect was correct, and that the custom alleged was not proved.

It should be noted that up to a comparatively recent time the Maharaja had been upholding the opposite contention, viz., that there was no such custom as that which was alleged by him in this case.

It should be stated that having regard to the facts stated in the earlier part of the judgment, in their Lordships' opinion there is no ground for holding that the proprietors of the Turk Ballia estate abandoned their estate and interest therein.

There remains another point with which their Lordships think it necessary to deal. It was argued on behalf of the appellant Maharaja that even assuming he failed to obtain a title to the lands in suit, either under the Regulation XI of 1825, S. 4, or by reason of the alleged custom, the sale of the lands in suit was invalid, and the plaintiff obtained no title thereby; consequently, it was argued that as the defendant was admittedly in possession of the lands, and if, as the defendant alleged, the plaintiff obtained no title by the sale, the suit should have been dismissed.

In view of their Lordships' decision on the above-mentioned points, the defendant, though in possession of the lands, was merely a trespasser. The question remains whether the sale was good and valid as against the original proprietors of Turk Ballia, so as to give the plaintiff a title on which he could

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base his suit for possession of the lands. There is no doubt that there was revenue due at the date of the sale, that such revenue was not paid, although, as stated in the appellant's case, notices had been given to the original proprietors to pay the revenue alleged to be due; and their Lordships are satisfied that the collector had jurisdiction to sell, and that the allegations as to irregularities in the sale were not substantiated.

Further, no suit was instituted within a year of the sale, and the provisions of S. 33 of Act XI of 1859, might have to be considered.

For these reasons their Lordships are of opinion that the sale was not invalid, and that the plaintiff did obtain a good title as the purchaser at the sale—and that he was competent to obtain a decree for possession against the defendant, who had no title to the lands.

Though not agreeing, as already stated, with some of the grounds of the High Court's judgment, their Lordships are of opinion that the decree of the learned District Judge was correct, and that the Maharaja's appeal to the High Court was rightly dismissed.

They will, therefore, humbly advise His Majesty that this appeal should be dismissed, and that the appellant should pay the costs of the appeal.

Solicitors for appellant : *Watkins & Hunter.*

Solicitor for respondent : *Solicitor, India Office.*

H. C. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT :—LORD PHILLIMORE, LORD CARSON, LORD DARLING AND MR. AMEER ALI.

Dwarka Nath Singh and others ... *Appellants**

v.

Keshri Mall and others ... *Respondents.*

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Power-of-attorney—Construction—Hindu Law—Joint family—Members of—Power-of-attorney in favour of one of, by the others—Joint family debts—Mortgages in respect of—Power to execute—Money limit imposed by power—If applies to each of mortgages or to all mortgages put together

Defendants 1 to 3 were brothers and members of a joint Hindu family governed by the Mitakshara law. Defendants 1 and 3 executed a power-of-attorney in favour of defendant No. 2, which provided *inter alia,* as follows.—"If .... in respect of any mauza or share of land owned and

*P. C. Appeal No. 125 of 1924. 4th March, 1927.

possessed by us, the executants, the said Mokhtar-Am shall grant simple or zarpeshgi-thika or make mortgage with possession, or in times of necessity after borrowing up to Rs. 4,000 from any one for expenses of cases, purchase of milkiat and mokarrari payment of public demands and other necessary and incumbent work relating to us, the executants, the Mokhtar-Am may execute mortgage deeds jointly with himself or in case of necessity may make our signatures upon the aforesaid bonds."

Purporting to act under the said power-of-attorney defendant No. 2 executed at intervals three mortgage deeds, each for a sum less than Rs. 4,000, but all for over that sum, mortgaging properties of the joint family of all the defendants.

In a suit brought to enforce the mortgages by a sale of the mortgaged properties, the High Court found that, with the exception of the "present advance" in each case, the amount for which each of the mortgages was executed constituted an antecedent debt due by the defendants to the plaintiffs under Bahi Khata, and that it was necessary for the said defendants to pay off such sums to the plaintiffs. The High Court accordingly passed a mortgage decree for the amounts thus found to constitute antecedent debts. The High Court also held that defendant No. 2 had the power to enter into different mortgage transactions, each transaction being for a sum not exceeding Rs. 4,000.

Held, that the words in the power-of-attorney, "or in respect of any mauza or share of land owned and possessed by us, the executants, the said Mokhtar-Am shall grant simple or zarpeshgi-thika or make mortgage with possession", were quite sufficient to confer upon the defendant No. 2 the power to execute mortgage bonds for debts for which the joint family was liable, and that the decision of the High Court was therefore right.

Quaere: Whether the power-of-attorney authorised the defendant No. 2 to borrow in excess of Rs. 4,000 by different mortgage transactions ?

Appeal (No. 125 of 1924) from a decree, dated the 1st August, 1923, of the High Court at Patna, which reversed a decree of the Court of the Subordinate Judge of Gaya, dated the 23rd March, 1920.

Wallach and *Ali Afzal* for appellants.

Dube for respondents.

4th March, 1927. The Judgment of their Lordships was delivered by

Lord Carson.

LORD CARSON.—The plaintiffs (respondents), who carry on the business of cloth merchants and money-lending at Gaya, brought the action against the defendants to enforce three mortgage bonds dated the 11th April, 1911, the 13th July, 1912, and the 5th November, 1914 respectively. The plaintiffs claimed a decree for the payment of the principal and interest due under the bonds in suit, and in default of payment thereof for the sale of the mortgaged properties belonging to the defendants, who are members of a joint and undivided Hindu family governed by the Mitakshara law. The defendants Nos. 1, 2 and 3 are brothers,

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and it appears that on the 7th January, 1899, Dwarka Nath Singh, defendant No. 1, and Kishun Prasad Singh, defendant No. 3, executed a power-of-attorney in favour of Brijnath Singh, defendant No. 2, which provided as follows .—

"If in any civil or criminal Court subordinate to the Calcutta High Court it be necessary for us, the executants, to appear personally and to make defence there the said Am-Mokhtar himself shall appear and make defence in the cases on behalf of us, the executants, and in case of necessity shall depose on solemn affirmation, or in respect of any mauza or share of land owned and possessed by us, the executants, the said Mokhtar-Am shall grant simple or zarpeshgi-thika or make mortgage with possession, or in times of necessity after borrowing up to Rs. 4,000 from any one for expenses of cases, purchase of milkiat and mokarrari payment of public demands and other necessary and incumbent work relating to us, the executants, the Mokhtar-Am may execute mortgage deeds jointly with himself or in case of necessity may make our signatures upon the aforesaid bonds"

In April, 1911, the sum of Rs. 2,837-12-0 was found due from the defendants Nos. 1 to 3 to the plaintiffs after settlement of the account (Bahi Khata) and on the 11th April, 1911, the said Brijnath Singh (defendant No. 2), acting under the said power-of-attorney, executed a deed of mortgage purporting to be for himself and on behalf of his brothers, defendants Nos. 1 and 3, in favour of the plaintiffs, and hypothecated certain joint family properties. It was for the sum of Rs. 3,300, which was made up of two items, viz., alleged antecedent debts due from the said defendants amounting to Rs. 2,837-12-0 and cash lent to defendant No. 2 at the time of the execution of the mortgage, Rs. 462-4-0. The said defendant No. 2 similarly executed a second mortgage in favour of the plaintiffs on the 13th July, 1912, for Rs. 1,400, which was made up of three items, alleged antecedent debts due from the defendants Nos. 1 to 3—Rs. 505-13-0, Rs. 620, borrowed by defendant No. 2 in order to discharge a decretal debt due from the defendants to Promotho Nath Mitter, and cash lent to the defendant No. 2 at the time of the execution of the bond, amounting to the sum of Rs. 274-3-0. The third mortgage bond was similarly executed by the defendant No. 2 on the 5th November, 1914, in favour of the plaintiff for Rs. 2,000, which consisted of two items, viz., alleged antecedent debt due from the same defendants, Rs. 1,173-4-3, and cash lent to defendant No. 2 for defraying the necessary household expenses at the time of the execution of the bond, Rs. 826-11-9.

The defendant No. 2, who signed and executed the mortgage bonds sued upon, did not appear or contest the plaintiffs' claim, but the other contesting defendants, who are now the

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appellants, denied the genuineness and validity of the power-of-attorney or that the defendants Nos. 1 and 3 had power to execute it, and also pleaded that the said mortgage bonds were beyond the authority vested in the Moktarnama (moktar ?) —defendant No. 2. They also alleged that the necessities indicated in the said mortgage bonds were wrong and false.

The action was tried in the Court of the Subordinate Judge of Gaya, who after hearing the evidence gave judgment on the 23rd March, 1920. On the question of the genuineness and validity of the mortgage bonds and the passing of the consideration money, he stated as follows :—

"From the deposition of P. W. 1, P. W. 2, P. W. 3, P. W. 4 and P. W. 7, I am perfectly satisfied, and I hold it as a fact that the bonds in suit were duly executed and properly attested, and that defendant No. 2 executed them for self and for his brothers, defendants Nos. 1 and 3, in consideration of their previous debts due to the plaintiffs under Bahi Khatas, as also in consideration of cash loans advanced on the occasions of each bond. There is no reason whatever why the aforesaid witnesses should not be relied upon. Previous debts have been satisfactorily proved by the voluminous account books and also by the Hath Chithas written and signed mostly by the defendant No. 2 and partly by the defendant No. 1."

The learned Subordinate Judge, however, held that upon the construction of the said power-of-attorney the defendant No. 2 had no power to borrow more than Rs. 4,000, and that the terms of the power-of-attorney did not authorise the defendant No. 2 to execute bonds for the price of cloths, etc., and the debts due under Bahi Khata, etc. In the result he dismissed the plaintiffs' claim for a mortgage decree against the defendants, but granted a simple money decree against the defendant No. 2 only for the amount claimed, with costs and further interest at the rate of 6 per cent. per annum until realisation.

Upon appeal by the present plaintiffs (respondents) to the High Court of Judicature at Patna (Civil Appellate Jurisdiction), that Court decided that upon the true construction of the power-of-attorney there was complete power in Brijnath Singh to borrow money on behalf of the joint family and for the purposes of the joint family, and to execute mortgage bonds on behalf of his brothers and himself jointly, and the learned Judges held that they were not prepared to agree with the argument that defendant No. 2 had no power to enter into different mortgage transactions, each transaction being for a sum not exceeding Rs. 4,000, if it was necessary for him to do so on behalf of the joint family.

Their Lordships in the High Court examined each of the mortgage bonds in detail, and in each case held as regards the

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moneys which have been already referred to as antecedent debts on accounts stated (Bahi Khata) the same were moneys due for (by ?) the joint family for which the defendant No. 2 was entitled under the power-of-attorney to bind himself as well as his brothers by the execution of the mortgages to the extent of such debts. They, however, disallowed the "present advance" in each case on the grounds that there was no evidence that such advances were borrowed for joint family necessity.

The High Court, therefore, on the 1st August, 1923, allowed the appeal and set aside the judgment and decree passed by the Subordinate Judge and gave a decree to enforce the mortgage bonds on the terms and for the amounts already indicated. From that judgment the present appeal has been presented to His Majesty in Council.

It is to be observed that both the Courts below have held that the sums of money in respect of which the decree appealed from has been made constituted antecedent debts due by the defendants Nos. 1 to 3 to the plaintiffs under Bahi Khata, and it was necessary for the said defendants to pay off such sums to the plaintiffs. Under the circumstances their Lordships see no reason for differing from the conclusions arrived at by the Appellate Court. Their Lordships think it unnecessary to decide, as the High Court did, whether the power-of-attorney authorised the defendant No. 2 to borrow in excess of Rs. 4,000 by different mortgage transactions, as, having regard to the findings referred to that the sums mentioned in the respective mortgages and for which the decree has been given in the High Court were debts for which the joint family was liable, their Lordships consider that the earlier words in the power-of-attorney, throughout relied on in the High Court, viz., "or in respect of any mauza or share of land owned and possessed by us, the executants, the said Mokhtar-Am shall grant simple or *sarpeshgi-thika* or make mortgage with possession," are quite sufficient to confer upon the defendant No. 2 the power to execute the several mortgage bonds for the amounts specified by the High Court.

Their Lordships are therefore of opinion that this appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants : *W. W. Box & Co.*

Solicitor for respondents : *H. S. L. Polak.*

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, *K. C., Chief Justice* AND MR. JUSTICE WALLER.

The Public Prosecutor ... *Appellant**

v.

Kandasami Thevan ... *Accused.*

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Thumb-impression—Taking of, by Court for purposes of comparison with that in document in respect of which the offence is alleged to have been committed by accused—Conviction based on comparison of two impressions—Legality.

There is no objection in law to the taking of the accused's thumb-impression, if the Judge thinks it relevant at any time; nor is a conviction based on a comparison of the thumb-mark so taken with the thumb-mark on the document in respect of which the accused is alleged to have committed an offence in the least objectionable.

Basari Hajam v. *King-Emperor,* (1922) I L R 1 Pat. 242 dissented from.

Appeal against the order of acquittal of the Court of Session of East Tanjore at Negapatam of the East Tanjore Division in Sessions Case No. 24 of the calendar for 1923.

The Public Prosecutor for Crown.

C. A. Seshagiri Sastri for accused.

The Court delivered the following

Schwabe, C. J.

JUDGMENTS :—*Schwabe, C. J.* :—This is an appeal by the Crown against the acquittal of the accused on charges relating to a money order which came to his hands in his capacity of postman. I am quite at a loss to understand how, on the face of the evidence, in this case, the learned Judge could have arrived at the conclusion at which he arrived. In my judgment, it is against all the evidence. He has given entirely wrong grounds from start to finish.

The facts are that Rs. 20 was sent to a woman called Muniammal by her daughter who was away in the Malay States. The money order, Exhibit C, purports on the face of it, to have been paid over to the lady, P. W. 1, and to bear her left hand thumb-mark witnessed by a man called Doraiswami. The accused says that he received that document and the money from the local postmaster, took it to P. W. 1, paid the money to her and got her receipt by taking her thumb-mark witnessed by Doraiswami. It is perfectly clear on the evidence that he did nothing of the kind. There can be no doubt whatever that the witness's signature is a forgery and there cannot be the slightest doubt that the thumb-mark on the document is not the

*Criminal Appeal No. 480 of 1923. 12th October, 1923.

The Public Prosecutor v. Kandasami Thevan.

Schwabe, C. J.

thumb-mark of P. W. 1, but is the thumb-mark of the postman himself, the accused. The learned Judge declines to act on what he describes as the evidence of an expert, that the thumb-mark on Exhibit C is similar to the thumb-mark of the accused. The evidence was not that it was similar but it was that it was identical. He apparently accepts the evidence that the mark on Exhibit C has no resemblance to either of the thumb-marks of P. W. 1, but he suggests that it is possible that it was not her thumb-mark but was her finger-mark. It is quite clear that the definite rule of the post office well known to the accused was that he is to take the left thumb-mark of the person who cannot write. There was no evidence at all before the Court that there was any resemblance between this mark and the finger-marks of P. W. 1 and, therefore, this suggestion is a figment of the learned Judge's imagination. He further purports to follow a ruling in *Basari Hajam* v. *King-Emperor* (1), a case on which considerable doubt has already been thrown by this Court on other points in *Public Prosecutor* v. *Virammal* (2) and the part on which he relies is a statement in the judgment of Bucknill, J., to the following effect:—

"The very fact of the taking of the thumb-impression from an accused person for the purpose of possible manufacture of the evidence by which he could be incriminated is in itself sufficient to warrant one in setting aside the conviction upon the understanding and upon the assumption that such was not really a fair trial."

It was applied in this case by the learned Judge to certain impressions of the accused's thumb-marks taken before the Magistrate. It really was unnecessary for anything that the learned Judge had to apply his mind to, because there were ample examples of the accused's thumb-marks without having recourse to that particular example which was excluded. But I think it is very desirable to say that I wholly disagree with the remark I have quoted from the judgment of Bucknill. J. Why the taking of the thumb-impression from an accused person should be described as being taken for the purpose of possible manufacture of the evidence, or on what principle of law a conviction based on the resemblance between that thumb-impression and the thumb-impression on the document in question in the suit is to be set aside on the assumption that it was not a fair trial is beyond my comprehension. It is enough for me to say that I see no objection in law at all to the taking of the accused's thumb-mark, if the Judge thinks it relevant at any

1. (1922) I L R 1 Pat. 242. 2. (1922) 23 Cr L J 694.

time; nor do I think that a conviction based on a comparison of the thumb-mark of the accused person with the thumb-mark on the document in question in the suit is in the least objectionable. The question of identity of the thumb-mark is a question of fact to be decided by evidence as any other question of fact; as I have already stated, in my judgment, it is clearly established in this case that the thumb-mark on the document in question in the suit is the thumb-mark of the accused. In my judgment, there is ample evidence to convict this accused. I shall not, however, part from this case without saying something about certain documents, Exhibits I, II and II (*a*). It would seem to be a fact, and clearly established as a fact, that P. W. 1, received from her daughter a registered letter, two months after the date of the alleged payment to her of this money, saying that she had sent this money and had no receipt for it, and that P. W. 1 took that letter to the postmaster at Nidur. She having told him that she had not received the money and he having got what purported to be her receipt in the records of the post office, he said he would make enquiries and see her again. She came two days later and was then met by the accused, and the accused handed to her Rs. 20 and took her thumb-mark as a receipt for the payment. The receipt has never been produced. At a later date when the higher postal authorities were making enquiries into the matter, this woman was got somehow to the post office and statements were taken from her. The first one of them Ex. I, taken by the postmaster, is interpreted by him to mean that she was then stating that she had been paid Rs. 20 at its due date, that is, in December; and the same statement is repeated in her later statements, Exs. II and II (*a*), taken by the Inspector on a later occasion. They were written by the Inspector's peon in Tamil, because the Inspector could not write Tamil freely, and her thumb-impressions were taken. They are badly translated into English. They purport to show that they were read over to P. W. 1. They were then shown to her at the trial to show, and were apparently accepted by the learned Judge as showing, that the whole story was wrong and that she really had received the money in December. The postmaster, who took the first statement Ex. I, knew perfectly well that that was not what she meant to say, because she had come with a man whom she had got to read to her the letter from her daughter and had said, "Here is that letter, why have I not got the money?" He then delays matters so as

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to give time to the accused to refund the money which he had stolen and then writes a statement which looks as if the woman was satisfied that she had been paid at the proper date and so supplies evidence to save this dishonest postman when the matter comes up for discussion. I think it is a matter into which very careful enquiry should be made by the postal authorities to ascertain how far this postmaster was a party to the fraud and how far the Inspector was justified in taking the statements which he took in the circumstances of this case. However, it is a matter with which we are not concerned. What we are concerned with is to see that justice is done. I am quite satisfied that this was a deliberate misappropriation of the money entrusted to this postman and that the accused thereby committed criminal breach of trust. He must be convicted of that charge. For a public servant like a postman to commit a crime of that kind, to bolster it up with forging the name of a witness and to substitute his own thumb-mark for that of the payee is a very serious crime indeed. The maximum punishment for that offence is transportation for life or imprisonment for ten years. So far, as we know, this is his first offence and I, therefore, think that the proper sentence is a sentence of rigorous imprisonment for three years.

Waller, J.

Waller, J. :—I entirely agree. There can be no doubt whatever that Muniammal was not paid the money on the alleged date, but about two months later after she had received a letter from her daughter. It is clear that her supposed thumb-impression on the acknowledgment is really that of the accused and that the signature of the attesting witness is a forgery. There is, however, no appeal against the acquittal on the charge of forgery but only against the acquittal under S. 409, Indian Penal Code. I agree that the acquittal should be set aside and the accused should be convicted of an offence under S. 409, Indian Penal Code. I entirely agree in the opinion which the learned Chief Justice has expressed as regards the ruling in *Basari Hajam* v. *King-Emperor* (1).

A. S. V. *Appeal allowed.*

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1. (1922) I L R 1 Pat. 242.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Muthukumarasami Mudaliar *alias*
Muthaiya Mudaliar and others...*Appellants** (*Defts.* 1 *to* 3)
v.
Harinarayana Mudaliar (dead)
and others ... *Respondents* (*Plaintiffs* 2 *and* 3 *and Defts.* 4 *and* 5 *and L. R. of 2nd Plaintiff*).

Muthukumarasami Mudaliar *v.* Harinarayana Mudaliar.

Specific Relief Act (*I of* 1877), *S.* 42—*Adoption by daughter of* propositus—*Right of nearest reversioner of* propositus *to sue to set aside the adoption.*

Where the widowed daughter of the *propositus* professes to adopt a son, the nearest reversioner in the family of the *propositus* has a right of suit, within the terms of S. 42 of the Specific Relief Act, to set aside such adoption.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram in A. S. No. 3 of 1923 (A. S. No. 419 of 1922, District Court, East Tanjore) preferred against the decree of the Court of the Additional District Munsif of Tiruvalur in O. S. No. 130 of 1920 (O. S. No. 370 of 1919, Principal District Munsif's Court, Tiruvalur).

The Advocate-General (*T. R. Venkatarama Sastri*) and *M Bhaktavatsalam* for appellants.

S. Panchapagesa Sastri for 2nd respondent.

The Court delivered the following

JUDGMENT :—The only point for determination in this appeal (except an application for an amendment of the pleadings which will be dealt with later) is whether supposing that the widowed daughter of the *propositus* professes to adopt a son, the nearest reversioner in the family of the *propositus* has a right of suit within the terms of S. 42, Act I of 1877, to set aside such adoption. The point was not raised in the Lower Courts where the parties were content to fight out the issues on the facts; so it is not a question whether the Lower Courts erred in discretion in allowing the suit, the time has long gone by to discuss discretion, but whether in law such a suit can possibly lie The plaintiff is the reversioner, the 2nd defendant is the widowed daughter and the 3rd defendant is the person alleged to have been adopted by her though as now found the adoption was invalid.

*S. A. No. 1844 of 1923. 16th February, 1927.

Muthu-kumarasami Mudaliar v. Harinarayana Mudaliar.

It is conceded by the learned Advocate-General that if the 2nd defendant had alienated the estate, a suit would undoubtedly lie. Would a suit lie if instead of actual alienation the 2nd defendant designates a stranger as heir to the property?

The language of S. 42 is very wide and the appellants' argument has proceeded rather upon its interpretation by the Privy Council in *Janaki Ammal* v. *Narayanasami Aiyar* (1) than upon a direct consideration of its actual wording. In that case the plaintiff claiming to be reversioner sued a widow for alleged acts of waste. It was found that no waste had been committed, but the plaintiff was entitled to a declaration that he was reversioner. The Judicial Committee held that at the time of the declaration it was impossible to predicate who would be the ultimate reversioner, and therefore such declaration was rather futile. But a reversionary heir with no more than a hope to the succession could demand that the estate should be kept free from danger. That part of the suit which related to the alleged waste had failed and the case must accordingly be treated as if the suit had been simply one for a declaration of the plaintiffs' individual right.

It is difficult to see how that case can stand on all fours with the present facts. Here the allegation of malfeasance has succeeded, and, can a reversioner who sues to set aside an adoption be said simply to sue for a declaration of his individual right? The learned Advocate-General is driven to the position that such an adoption is no present danger to the estate and it is merely an incident in the simple contest between the plaintiff and the 3rd defendant as to who is the nearer reversioner. I should hold that such an adoption is a danger to, though of course not an immediate alienation of, the estate; and if, as here, it is directly attacked by the plaintiff he is not simply suing for a declaration of his individual right.

That S. 42 should be read in no restricted sense is made clear by another pronouncement of the Judicial Committee in *Saudagar Singh* v. *Pardip Narayan Singh* (2):

> "It appears to their Lordships to be clear on this section that where any deed is executed the result of which may be to prejudice the interests of the reversionary heirs those heirs though still reversionary and though they may never get any title because events may preclude them from doing so, may have a declaration as to the effect of the deed."

Danger is certainly not restricted to present danger or accomplished fact when it may be so wide as to include any-

1. (1916) I L R 39 M 634 : 31 M L J 225 (P C).
2. (1917) I L R 45 C 510 at 514: 34 M L J 67 (P C).

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thing which may be to the prejudice of the presumptive reversionary heir.

And this wide sense is that in which this Court has always read S. 42. *Surayya* v. *Annapurnamma* (3) establishes that a reversioner may sue to have a document purporting to give leave to adopt declared a forgery; from which it would seem that a suit would certainly lie to set aside an adoption, even though it were by the daughter and not by the widow. Both the document and the actual act could be described as something the result of which may be to prejudice the interest of the reversionary heirs. *Latchmamma* v. *Appanna* (4) and *Bobba Padmanabhudu* v. *Bobba Buchamma* (5) are to the same effect and as regards the general policy of the Court in such matters, I defer to the observations of Ayling, J.

Therefore I see no reason to hold that this suit does not lie within the terms of S. 42.

In the course of the trial the 2nd defendant professed to have adopted the 3rd defendant with the alleged consent of her sapindas. It was suggested that this adoption might be brought within the purview of the suit but the parties preferred to confine it to the original pleadings. That being so it is too late for the appellant now to ask me to have the matter re-opened.

The Appeal is dismissed with costs of contesting respondents.

N. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS, MR. JUSTICE RAMESAM AND MR. JUSTICE WALLACE.

The Commissioner, Corporation of Madras ... *Appellant**

v.

T. Ekambara Naicker and another ... *Respondents.*

Commissioner, Corporation of Madras v. T. Ekambara Naicker.

Government of India Act (1919), S. 49 (1)—*Government order and notification in the official Gazette—Presumption that the order was passed by the Governor in Council—Evidence Act, Ss.* 78 *and* 114—*Madras City Municipal Act* (*IV of* 1919)—*Rules framed under the Act*—*R.* 6—*Scope.*

Where a notification is published in the *Fort St. George Gazette* fixing the date of a Municipal election, it is proof of the order of the Government fixing the election under S. 78 of the Evidence Act, and as, under S. 114

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*O. S. Appeal No. 99 of 1926. 22nd April, 1927.

3. (1919) I L R 42 M 699. 4. (1921) 14 L W 302.

5. (1918) 35 M L J 144.

Commissioner, Corporation of Madras v. T. Ekambara Naicker.

of the Evidence Act there is a presumption that all official acts are regularly done, a presumption arises that this act of publication was done regularly, namely, in accordance with the rules. Where in addition to this notification, the Government order, which authorised the publication of the notification in the Gazette and which has been authenticated as being by order of the Government, Ministry of Local Self-Government complying with the rules framed under S. 49 of the Government of India Act, is produced, the order must be taken to have been properly published and under S. 49 of the Government of India Act the proceedings and orders cannot be called in question in any legal proceeding.

Where a schedule of valid nominations was prepared by the Commissioner before the date originally fixed for election, and objections were taken to this list but they were not upheld, and consequently when the final orders of the Chief Judge was passed, the list of valid nominations remained the same as originally framed,

Held, that the list having been published as prescribed by the rules was in force and was available for the election which was ordered to be held on a subsequent date and consequently the provisions of R. 6 of the Rules framed under the City Municipal Act of 1919 were satisfied.

In the matter of the Indian Specific Relief Act and the Madras City Municipal Act and In the matter of the election of a Councillor for 29th Royapettah Division, Madras.

Appeal from the judgment of the Hon'ble Mr. Justice Srinivasa Aiyangar, dated 7th October, 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

S. Rangaswami Aiyangar for appellant.

A. Krishnaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal against an order made under S. 45 of the Specific Relief Act and relates to the holding of the election of a Councillor for the 29th Division of this City. A great many objections to the validity of the proceedings prior to the actual election were taken before the learned Judge in the Lower Court but he has disposed of nearly all of them in favour of the appellant. The ground on which he granted this order staying the election was that the order of Government and its notification in the *Fort St. George Gazette* fixing the date of election as the 30th September, 1926 were invalid because they were not proved to be orders framed in accordance with law. The learned Judge held that the order had to be one made by the Governor in Council meaning thereby the Governor in consultation with his Ministers. It was suggested that there were rules under which the order had been issued and that in accordance with those rules the order was a

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perfectly valid one within the meaning of S. 49 (1) of the Government of India Act. The learned Judge, however, held that the power of the Governor in Council could not be delegated and could not be exercised under any departmental rules by any persons other than those constituted as the proper authority. No rules were produced in the Lower Court because neither party was in a position to obtain these rules from Government but now the learned Advocate-General on whom the notice of this appeal was served appears and has produced a copy of the rules framed under S. 49. Apart from these rules it seems to us that the learned Judge was wrong in disregarding the Government order and the notification. The notification fixing the election was published in the local Gazette and under S. 78 of the Evidence Act it is proof of the order of Government fixing that election. Under S. 114 of the Evidence Act a presumption arises that all official acts are regularly done. There is, therefore, a presumption that this act of publication was done regularly, namely, in accordance with the rules. Rules are contemplated under S. 49 and therefore we may presume that the notification was properly published in the absence of any evidence to the contrary. In addition we have a Government order produced which itself orders the publication of the notification in the Gazette and that Government order is authenticated as being by order of the Government, Ministry of Local Self-Government complying with the rules framed under S. 49 which have not been shown to be *ultra vires*. We are, therefore, satisfied that the order was properly published and consequently under S. 49 itself these proceedings and orders cannot be called in question in any legal proceeding.

This disposes of the appeal so far as the appellant is concerned; but the respondent seeks to support the order on various other grounds. Those grounds relate to the interpretation of the Election Rules 1 to 6 and have been dealt with fully by the learned Judge in the Lower Court, and we agree in his conclusion on all points except one. This point relates to R. 6 of the Election Rules. That rule lays down that three days before the election the Commissioner should prepare a schedule of valid nomination of candidates for election and prescribes further procedure. This schedule of valid nominations was prepared by the Commissioner before the date originally fixed for election, namely, the 22nd September, 1926. Objections were taken to this list but they were not upheld and consequently,

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when the final orders of the Chief Judge had been passed, the list of valid nominations remained the same as originally framed. This having been published as prescribed by the rules was in force and was available for the election which was ordered to be held on a subsequent date. We consequently hold that the provisions of R. 6 were satisfied in this case. In the result the appeal must be allowed and the petition dismissed with taxed costs throughout.

N. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE DEVADOSS.

S. P. M. Muthiah Chetti and others ... *Appellants** (*Defts.* 1, 2 *and* 4)

v.

Muthu K. R. A. R. Karuppan Chetti and others ... *Respondents* (*Plffs.*).

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Contract Act, S 15—Release deed by principal to agent—Agent in possession of documents, account books and cash—Refusal by agent to hand over these to new agent till release was executed—Pleader—Power to compromise or make admissions so as to bind client.

Where an agent, who was sent to Singapore by his principal to conduct the money-lending business there, was stopped and was asked to hand over the business with the account books, documents and cash on hand to the new agent, but he refused to hand over charge until and unless a release deed was executed in his favour by the principal releasing him from all claims against him with reference to his agency, and the principal fearing that the stoppage of the business was likely to cause heavy loss executed a release deed as required by the agent,

Held, that the release deed was obtained from the principal under circumstances which amounted to coercion within the meaning of S. 15 of the Indian Contract Act.

(1) A counsel has authority to make admissions in Court on behalf of his client on matters of fact relevant to the issues in the case in which he is engaged. Admissions on questions of law would not bind the client.

(2) A counsel has authority to confess judgment, withdraw or compromise, or refer to arbitration the suit in which he is instructed if his doing so is for his client's advantage or benefit even though he has no express authority from his client.

(3) A counsel cannot without express authority agree to compromise or refer to arbitration matters unconnected with the subject-matter of the suit in which he is instructed.

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*A. S. No. 140 of 1925. 2nd February, 1927.

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(4) Where in the course of a suit a counsel makes an admission as to a collateral matter, or gives up a doubtful claim which is not a subject-matter of the suit, there is a presumption that the counsel acts under instructions if the admission or the giving up of the doubtful claim is for the benefit of the client.

(5) It is a question of fact in each case whether the counsel acts under instructions when he compromises or refers to arbitration matters not involved in the suit and the Court on a consideration of the probabilities and the circumstances of the case can find that the counsel acted on instructions even though there is no direct evidence on the point.

(6) A counsel has no power to make an admission in, or compromise or refer to arbitration, a suit if he is instructed not to do so, without express authority from his client.

Appeal against the decree of the Court of the Additional Subordinate Judge of Sivaganga in O. S. No. 27 of 1924 (O. S. No. 22 of 1924 on the file of the Sub-Court, Sivaganga).

C. V. Anantakrishna Aiyar and *C. S. Rama Rao Sahib* for appellants.

A. Krishnaswami Aiyar, V. Rajagopala Aiyar and *S. Jagadisa Aiyar* for respondents.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS :—*Kumaraswami Sastri, J.* :—The plaintiffs are a firm of Nattukottai Chetties carrying on banking business in Singapore and other places. They allege in the plaint that they appointed the defendant as their agent to conduct business in Singapore for a period of 3 years and as his conduct was found not to be satisfactory they sent another agent after the expiry of the 3 years' period and wrote to the defendant to hand over the business with the account books, documents and cash on hand to the new agent, that the defendant refused to hand over charge of the business to the new agent until and unless the accounts between him and the plaintiffs were settled and the letter containing the terms of the agency written by him to the plaintiffs, called the salary chit, was returned to him and a release deed was executed in his favour releasing him from all claims against him with reference to his agency, that as the defendant was obdurate and as the plaintiffs feared that they might suffer heavy loss by the stoppage of business they consented to authorise their new agent to give a release to him, that the defendant after getting the release deed and the return of the salary chit handed over the account books, vouchers and cash on hand to the new agent and that the release deed was obtained under coercion and is therefore voidable at their instance. They further allege

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that the defendant had improperly debited them with the loss sustained by him in his own private transactions in dollars and that he lent large sums of money without proper security and contrary to orders. The plaintiffs pray that the release deed be declared void as having been obtained under coercion and that the defendant be directed to render an account of the transactions during the period he was their agent. The defendant in his written statement denies that the release deed was obtained under coercion and avers that he acted honestly and diligently in his capacity as agent, that he did not wrongly debit the plaintiffs with his losses, that he did not improperly lend money to the customers and that the plaintiffs are estopped by their conduct from denying the validity of the release deed.

Two preliminary issues were framed by the Subordinate Judge:

(1) Whether the acquittance granted to the defendant was done under the circumstances detailed in the plaint and hence voidable; and are the plaintiffs entitled to call for an account of the defendant?

(2) Whether the allegations in paragraphs 29 and 30 of the written statement are true, and does it estop the plaintiffs from doing so ?

The Subordinate Judge held that the release deed was obtained from the plaintiffs' agent under coercion and that they did not ratify the release deed and directed an account to be taken. The defendant has preferred this appeal.

The first question for decision is whether Ex. IV, the release deed, was obtained under coercion and as such voidable at the instance of the plaintiffs. The admitted facts are: the plaintiffs appointed the defendant as their agent to conduct their business at two places in Singapore and the defendant, according to the custom obtaining among the Nattukottai Chetties, executed what is popularly known as "salary chit" (Ex. K) on 4th March, 1918, setting out the terms on which he undertook to work as the plaintiffs' agent. He went to Singapore and worked as their agent without any hitch till the beginning of 1920. He did not send the *kurippu* for Masi corresponding to February-March, 1920, as he should have done about the beginning of Panguni. He sent the *kurippu* for Masi and Panguni on the 3rd of Chitrai corresponding to the 15th of April, 1920. *See* Ex. H (2). He wrote to the plaintiffs Ex. F on 24th May, 1920, making a special reference to the loss sustained in exchange transactions and promising to

make good the loss in some other transactions. The 1st plaintiff on the receipt of Ex. F sent to the defendant the following telegram (Ex. F-1) on 10th June, 1920:

"Deal with money-lending; don't have other transactions, see letter"

and wrote Ex. F (2) on 12th June, 1920, charging the defendant with having debited them with losses sustained by him in exchange transactions on his own private account and saying that if he had done the business for the firm he would have taken their permission before embarking upon speculation in the exchange market. The defendant continued to manage the plaintiffs' business at Singapore for more than a year after the date of Ex. F (2).

The plaintiffs appointed another agent one Adaikalavan Chetty in the place of the defendant and wrote to the defendant Ex. D-5 on 27th November, 1921 and informed him of their having sent Adaikalavan Chetty to take charge of the business, that he should get the accounts prepared and closed and that he should come away without delay. The following passage in the letter is important:

"As soon as he arrives, get the accounts prepared and closed and come without delay............. If there is something more to be collected, better get it collected and make out a copy of the items that can be copied and come away after getting the accounts closed. If in both the said firms any items are not collected and will have to be realised slowly, have them entered as old accounts and come away... . .. Please also intimate to me about the arrival of Adaikalavan Chetty there".

From this letter it is clear that the plaintiffs appointed a new agent and asked the defendant to come away from Singapore; in other words, they asked him to cease to be their agent at Singapore as soon as Adaikalavan Chetty went there and took charge of the business. The defendant did not hand over charge to Adaikalavan Chetty and insisted upon the accounts being settled in Singapore contrary to the custom prevailing among the Chettis and contrary to the terms of Ex. K and insisted upon his being given a release deed in respect of any claim that the plaintiffs might make in respect of any of the transactions conducted by him as agent. Ex. C written by Adaikalavan Chetty on 30th December, 1921, to the plaintiffs shows the attitude of the defendant at the time. He writes:

"When Muthiah Chetti was asked to prepare and give accounts in the order of dates, he said 'I cannot prepare and give account I shall prepare the *ayinthogai* (balance sheet) as matters stand and give the

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same. I should be relieved (of my duties) here and my salary chit should be given and the account settled."

When he was told that it was not the proper course and that he might prepare and give the accounts as matters stood and that the accounts might be settled on going to the headquarters as usual he said definitely:

"It cannot be done. My account should be settled here alone and I should be relieved of my duties."

Adaikalavan Chetty appealed to the defendant not to be obstinate and asked the other Nattukottai Chetties to persuade him to hand over charge of the business to him with the account books, etc. The friends of the defendant and the plaintiffs tried to induce the former to hand over the business to Adaikalavan Chetty and to have the accounts settled at the Chetties' place in Madura. The plaintiffs wrote Ex. D-2 on 5th January, 1922, complaining of his attitude as being "unusual, novel, indecent and improper" and asking him without allowing the business to get spoiled to write up and deliver the accounts and to let them know about it. The defendant wrote Ex. E-1 on 19th January, 1922, to the plaintiffs in which he stated:

"You should send my salary chit to Adaikalavan Chetty who has come here for the new account together with a letter signed by yourself and P. L. Avergal and directing that the accounts, documents, etc., of our shop and A. R. K. R. shop should be taken charge of in accordance with the balance sheet, my salary account, etc., looked into and a receipt granted (to me) so as not to have any further claim upon me."

The plaintiffs wrote Ex. D-3 on 1st February, 1922, complaining of his not having handed over the account books to Adaikalavan Chetty who had been waiting there from 25th Karthigai and informing him that as requested by him they had sent the salary chit to Adaikalavan Chetty and that he should after getting the salary chit deliver to Adaikalavan Chetty the new account, the accounts relating to the firm as well as the cash items, documents, box, packets, etc., and also execute the necessary power, assignment and all other documents without any further delay. The defendant insisted upon a release deed being executed in his favour before he could hand over the charge to Adaikalavan Chetty. From Exs. D, C and E series it is clear that the plaintiffs found themselves in a helpless state and reluctantly consented to do as the defendant wished. Ex. III written by the 2nd plaintiff to the 1st plaintiff on 19th March, 1922, shows the state of the

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mind of the plaintiffs. Adaikalavan Chetty strongly advised the plaintiffs to consent to give a release deed to the defendant as otherwise the plaintiffs might sustain heavy loss owing to stoppage of business and that if so advised they might take steps against him afterwards. Ex. IV was executed by Adaikalavan Chetty in favour of the defendant on 21st April, 1922, whereupon the defendant handed over the account books, cash, etc., to Adaikalavan Chetty.

The question is do the above facts make out that the defendant got the release, Ex. IV from the plaintiffs under circumstances which amount to coercion. He was in possession of the documents, account books and cash belonging to the plaintiffs. After he was asked to hand over charge to Adaikalavan Chetty he had no right to withhold from the plaintiffs' new agent their property. Adaikalavan Chetty remained there for about 4 months before he could get possession of the account books, etc., in order to carry on the business. The stoppage of the business was likely to cause heavy loss to the plaintiffs. Coercion is defined in S. 15 of the Contract Act, as "committing, or threatening to commit, any act forbidden by the Indian Penal Code or the unlawful detaining, or threatening to detain, any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement". The defendant, having withheld from the plaintiffs their property which they asked to hand over to Adaikalavan Chetty, has brought himself within S. 15 of the Contract Act, and the release deed he obtained under the circumstances is voidable at the instance of the plaintiffs. We therefore agree with the Lower Court in finding the first issue against the defendant.

It is unnecessary in this view to consider now the charges made by the plaintiffs against the defendant of having debited the loss sustained in his own private transactions against the plaintiffs in their accounts and of having lent large sums of money to impecunious customers. We may, however, observe in passing that from the correspondence it is not at all clear that the plaintiffs instructed the defendant not to dabble in exchange speculation. On the other hand the letters go to show that some of the Chetty firms including the plaintiffs were speculating in exchange transactions and the defendant also did business in dollars on behalf of the plaintiffs. As regards the loan to one Tirupathi Chetty it is not suggested that the defend-

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ant acted with a corrupt motive; on the other hand it is clear from the evidence that he lost about Rs. 18,000 the amount lent by him to Tirupathi Chetty.

Issue II.—Though the defendant in para. 31 of his written statement uses the word 'estoppel', what is pleaded is not an estoppel in the ordinary sense, but ratification of the arrangement under Ex. IV. No doubt, even a ratification may amount to an estoppel; but it would be more correct to put the question in the following form: whether the plaintiffs ratified the arrangement under Ex. IV; and, if so, whether they could go behind it. After the execution of Ex. IV the account books, cash on hand and the vouchers were handed over to Adaikalavan Chetty by the defendant and he executed a power-of-attorney in Adaikalavan Chetty's favour so as to enable him to collect the loans outstanding on mortgages. Adaikalavan Chetty died in August and the plaintiffs sent a third agent named Arunachalam Chetty. It was necessary that Arunachalam should get a fresh power-of-attorney from the defendant in order to realise the loans outstanding on mortgages. Ex. O was written by the solicitors of the plaintiffs to Muthiah Chetti on 5th April, 1923, in which they informed him of the death of Adaikalavan Chetty in August, 1922 and asked him whether he was "willing to execute a fresh power-of-attorney in favour of the present agent to enable him to deal with the mortgages and any other matters that may arise". The defendant's solicitors wrote Ex. Q on 13th April that their client had no objection to executing transfers of the mortgages in the names of the proprietors meaning the plaintiffs and that before agreeing to do so he required the plaintiffs to personally execute a release deed in his favour and that he was not satisfied with the release executed by Adaikalavan Chetty in his favour. The plaintiffs' solicitors answered Ex. Q on 14th April that everything had been done at the defendant's request and there was no reason why he should require a fresh release and that their clients were unwilling to accede to that request. The defendant's solicitors wrote to say that their client regretted that he could not see his way to execute a transfer of the mortgages unless the proprietors personally executed a release in his favour. An originating summons was then taken out by the plaintiffs' solicitors for a vesting order in respect of the mortgages standing in the name of the defendant, and the vesting order Ex. V was made by the Supreme Court of the Straits Settlements.

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A difficulty arose as regards the mortgage property within the State of Johore as according to the law of Johore a mere vesting order would not entitle the plaintiffs to sue on the mortgages obtained in the name of their agent, the defendant. The plaintiffs' solicitors wrote to the defendant's solicitors on 15th August, 1923:

"We find that there are certain difficulties in connection with the making of a vesting order in Johore and that it would therefore be necessary to sue for a declaration and an order to execute the transfer"

The defendant's solicitors replied:

"that in view of the position he (the defendant) has taken up with regard to the Singapore property he regrets he is unable to execute transfers of the mortgage properties in Johore, and that he will not oppose any order in the action if they undertake not to ask for any costs"

The defendant seems to have changed his mind as is clear from the letter of the plaintiffs' solicitors to his solicitors dated 24th September, 1923. He seems to have insisted that the counsel for the plaintiffs should make a statement that the plaintiffs ratified the arrangement under Ex. IV before he could undertake not to contest the claim and to facilitate the passing of a decree in plaintiffs' favour. As a mere vesting order on originating summons would not satisfy the requirements of the law obtaining in Johore the plaintiffs' solicitors filed Suit No. 817 of 1923 in the Supreme Court of the Straits Settlements at Singapore praying

"for an order directing the defendant to execute in the name of Moona Etana Toona Kana Roona Ahana Roona Moothiah Chetty in manner conforming with the law in Johore such memoranda or other documents as may be necessary according to the laws of Johore to transfer each of the said charges to the plaintiffs or their present agent Moona Etana Toona Kana Ahana Roona Arunachalam Chetty, son of Annamalai Chetty."

The defendant through his solicitors agreed to accept service of notice and the stipulation was that the draft judgment should be approved by the defendant's solicitors. In accordance with the arrangement the draft judgment was submitted to the defendant's solicitors as appears from the correspondence printed on page 102 of the printed papers. The defendant's solicitors made certain alterations and the plaintiffs' solicitors approved of the alterations. This was on 28th September, 1923. On 10th October, 1923 they sent the transfers in duplicate to the defendant's solicitors for his signature. The plaintiffs' counsel ratified the arrangement under Ex. IV as appears from the order of the Supreme

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Court of the Straits Settlements of Singapore, dated the 2nd October, 1923. The relevant passage is as follows:—

"and the plaintiffs by their counsel acknowledging that the said release was and is in full force and of full effect and by consent, it is this day adjudged and ordered by consent, that the defendant do execute in the name of Moona Etana Toona Kana Roona Ahana Roona Muthiah Chetty "

The question is whether this statement amounts to a ratification of Ex. IV by the plaintiffs and whether the plaintiffs are bound by the statement of their counsel that the release was and is in full force and of full effect. The defendant knew or had reason to believe that the plaintiffs would challenge the validity of Ex. IV and he evidently consulted his solicitors as to the best course to be adopted and on their advice he insisted upon a second release deed from the plaintiffs failing which upon a clear statement that the plaintiffs ratified the arrangement evidenced by Ex. IV. It is clear from the correspondence that it was finally arranged that the defendant should not contest the suit and that the plaintiffs' counsel should make a statement ratifying the release deed Ex. IV and that the draft judgment should be approved by the defendant's solicitors and thereupon the plaintiffs' counsel made the statement above extracted.

It is contended by Mr. Krishnaswami Aiyar for the plaintiffs that the counsel had no authority to make the statement that "the plaintiffs acknowledge that the said release was and is in full force and of full effect" and that it is for the defendant to show that the counsel was specially authorised to make it. The Subordinate Judge has dealt with this point in an unsatisfactory manner. He observes in para. 60:

"From the correspondence to which I have referred above Ex. O series, it was seen that first defendant wanted to have Ex. IV established by the execution of a fresh release deed by the principals in person. That was not agreed to and the 1st defendant, I think, has been able to get reference made to the release deed somehow "

and he holds that the admission contained in the judgment does not affect the plaintiffs as an affirmance of the transaction of release.

That the plaintiffs' counsel made the statement contained in the order of the Supreme Court cannot be seriously disputed. The only question is whether he had authority to bind his clients by the statement he made. Mr. Krishnaswami Aiyar contended on the authority of *Digbijoy Roy* v. *Shaikh Ata Rahman* (1),

1. (1911) 17 C W N 156.

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Nundo Lal Bose v. *Nistarini Dassi* (2) and *Swinfen* v. *Swinfen* (3), that the counsel had no authority to make the statement and that the statement would not bind the plaintiffs. In *Digbijoy Roy* v. *Shaikh Ata Rahman* (1) it was held that although a pleader has no power to compromise a suit unless he is specially authorised in that behalf he can bind his client by an admission of a question of fact provided that question of fact falls within the scope of the suit in which he has been retained. In *Nundo Lal Bose* v. *Nistarini Dassi* (2) the counsel retained in one case consented to a compromise which affected other suits in which he was not retained. The compromise was objected to and before the decree was drawn up one of the parties applied for an order to stay the drawing up of the compromise decree and to have the alleged compromise set aside and the suit retried. Stanley, J., dismissed the application; and on appeal Maclean, C. J., and two other Judges allowed the application. The learned Chief Justice observes at page 438 :

"There cannot, I think, be any reasonable doubt at the present day that counsel possesses a general authority—an apparent authority which must be taken to continue until notice be given to the other side by the client that it has been determined—to settle and compromise the suit in which he is actually retained as counsel, and in the exercise of his discretion to do that which he considers best for the interest of his client in the conduct of the particular case in which he is so retained. Here, however, the compromise extended to collateral matters, to matters quite outside the scope of the particular case in which Mr. Mitter was retained as counsel, and, in order to bind the client, it must be shown that Mr. Mitter had, from his client, a special authority to compromise, and compromise upon the definite terms which are set up by the present respondents "

and refers to *Strauss* v. *Francis* (4), *Swinfen* v. *Swinfen* (3) and *Matthews* v. *Munster* (5) for the authority of a counsel to compromise on behalf of his client. This case is distinguishable on the facts. Here, there was no settlement of collateral matters. It was necessary to prove to the Court that the mortgages which were standing in the name of the defendant were taken for the benefit of the plaintiffs, that the defendant was a trustee of the plaintiffs and that the agency having terminated he was bound to make over the mortgage deeds to the plaintiffs. It cannot therefore be said that the ratification of the release deed, Ex. IV was a matter collateral to the subject-matter of the suit in which the statement ratifying the deed was made. The defendant insisted upon his being given a full discharge

1. (1911) 17 C W N 156. 2. (1900) I L R 27 C 428 (F B).
3. (1856) 1 C B N S 364 : 140 E R 150. 4. (1866) L R 1 Q B 379
5. (1877) L R 20 Q B D 141.

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as regards the agency and he was not satisfied with the release executed by the agent of the plaintiffs, and it was necessary for obtaining the order prayed for to make out that the defendant had ceased to be the plaintiffs' agent; and if for obtaining the relief therein prayed the statement insisted upon by the defendant with reference to the agency during the currency of which the mortgage deeds were obtained is made, it cannot be said that the counsel settled a matter collateral to the suit. In *Swinfen* v. *Swinfen* (3) the power of a counsel for compromising matters in dispute was considered at length. These are some observations of Crowder, J., which may be taken as lending support to Mr. Krishnaswami Aiyar's contention. He observes at p. 461:

"I am not aware that any counsel engaged in making terms ever supposed for a moment that his opponent had power to bind his client without express instruction."

There are a number of cases which take a liberal view of the authority of a counsel to compromise suits in which he is engaged. In *Elworthy* v. *Bird* (6) Sir John Leach, M. R., observes:

"In the absence of evidence a Court will conclude that he had authority, for it is not to be presumed that counsel would enter into an agreement without authority. There is in this case evidence on both sides, but after duly considering it I come to the conclusion that counsel had authority which would bind his client."

In *B. N. Sen & Bros.* v. *Chuni Lal Dutt & Co.* (7) the plaintiffs instituted a suit for the recovery of the price of goods sold and delivered to the defendants and for damages in respect of goods, of which it was alleged the defendants had refused to take delivery, making a total claim of Rs. 25,508. The defendants admitted that there was due from them to the plaintiffs a sum of Rs. 12,611 in respect of goods sold and delivered but claimed that there was due to them from the plaintiffs a sum of Rs. 58,000 in respect of various transactions between the parties. At the hearing of the suit the defendants' counsel in the absence of the defendants and without their express authority assigned a decree in favour of the plaintiffs for Rs. 22,117, without prejudice to the right of the defendants, if any, to proceed with their claim in their own suit. It was admitted that the attorney for the defendants who was present in Court never asked the learned counsel to settle the suit, nor did he put any limitation

3. (1856) 1 C B N S 364 : 140 E R 150.
6. (1824) Tamlyn 38 : 48 E R 16.
7. (1923) I L R 51 C 385.

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on the authority or discretion of the learned counsel in any respect to compromise the suit. Sanderson, C. J., and Richardson, J., held that the settlement was a matter within the apparent general authority of the counsel and was binding on the defendants. The following observation of the learned Chief Justice may well be applied to the present case:—

"In my judgment there is no evidence in this case that there was any limitation placed upon the authority of the learned counsel. .. I have a strong suspicion that the course which the learned counsel took on behalf of the defendants was a wise one, having regard to the nature of the suit and the admissions which the defendants made in the suit. At all events I am satisfied that the settlement was made within the authority of the learned counsel".

There are numerous cases, English and Indian, on the question of a counsel's power to make admissions in, or to refer to arbitration or compromise, suits in which he is instructed. A mere reference to the following cases would be sufficient as it is neither profitable nor necessary to consider them all in detail, *Bhut Nath Sircar* v. *Ram Lall Sircar* (8), *Swinfen* v *Lord Chelmsford* (9), *Chambers* v. *Mason* (10), *Strauss* v. *Francis* (4), *Dwar Bux Sirkar* v. *Fatik Jali* (11) and *Berry* v. *Mullen* (12) goes the length of laying down that

"the compromise made by a solicitor or counsel is binding on the client though it may have been made against his express directions unless the client has revoked the authority of the counsel or solicitor to compromise on his behalf and communicated the revocation to the other side. This must be done before the decree or order is sealed."

The following propositions are deducible from the authorities:—

(1) A counsel has authority to make admissions in Court on behalf of his client on matters of fact relevant to the issues in the case in which he is engaged. Admissions on questions of law would not bind the client.

(2) A counsel has authority to confess judgment, withdraw or compromise, or refer to arbitration the suit in which he is instructed if his doing so is for his client's advantage or benefit even though he has no express authority from his client.

(3) A counsel cannot without express authority agree to compromise or refer to arbitration matters unconnected with the subject-matter of the suit in which he is instructed.

4. (1866) L R 1 Q B 379.
8. (1900) 6 C W N 82 at 87.
9. (1859) F & F 619 · 29 L J Ex. 382.
10. (1858) 5 C B N S 59.
11. (1898) 3 C W N 222.
12. (1871) 5 I R 368.

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(4) Where in the course of a suit a counsel makes an admission as to a collateral matter or gives up a doubtful claim which is not a subject-matter of the suit, there is a presumption that the counsel acts under instructions if the admission or the giving up of the doubtful claim is for the benefit of the client.

(5) It is a question of fact in each case whether the counsel acts under instructions when he compromises or refers to arbitration matters not involved in the suit and the Court on a consideration of the probabilities and the circumstances of the case can find that the counsel acted on instructions even though there is no direct evidence on the point.

(6) A counsel has no power to make an admission in, or compromise or refer to arbitration, a suit if he is instructed not to do so, without express authority from his client.

The plaintiffs were anxious to have the mortgage deeds in order to enforce the right under them without delay as the fall in the price of rubber made the securities doubtful and they probably acted upon the principle of the apothegm "a bird in the hand is worth two in the bush" and consented to ratify the release deed and thereby secure the mortgage deeds without delay rather than pursue a doubtful remedy against the defendant. All the circumstances of the case and the evidence on record, the non-examination by the plaintiffs of their agent, Arunachalam, who instructed the counsel in the proceedings before the Supreme Court of Straits Settlements, the absence of any statement in the 2nd plaintiff's deposition that he or his brother, the 1st plaintiff, did not empower Arunachalam to make the statement as to ratification contained in the judgment of the Supreme Court of Singapore, the urgency with which the mortgage deeds were required by the plaintiffs and the speedy manner in which the suit was decreed in plaintiffs' favour owing to the defendant's consent to accept service and remain *ex parte* and the readiness with which the defendant executed the transfer deed within a fortnight of the approval of the draft judgment by his solicitors lead to the irresistible conclusion that the plaintiffs' counsel was specially authorised to make the statement that the plaintiffs acknowledged that the said release was and is in full force and of full effect. Even if the counsel was not specially instructed to make the statement, we hold that the circumstances of the case and the evidence on record fully justify the conclusion that

he acted within his authority in making the above statement. A decree has been passed embodying the statement by the Supreme Court of Singapore and in pursuance of that decree the defendant signed the transfer deeds. But for the statement the plaintiffs would not have got speedily, and in the manner they got, what they wanted. We have therefore no hesitation in holding that the plaintiffs by their counsel ratified the arrangement evidenced by Ex. IV and they cannot now sue to set it aside.

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In the result, the appeal is allowed and the plaintiffs' suit dismissed. But considering the conduct of the defendant we think he ought not to get his costs. We therefore direct that each party do bear his costs throughout.

Devadoss, J.—I agree and have nothing useful to add.

N. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADDRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE CURGENVEN.

Sri Rajah Rao Sri Swetachelapati Ramakrishna Rangarao Bahadur Garu, Rajah of Bobbili ... *Appellant** (*24th Counter-Petitioner*)

v.

Ayyagari Sodemma ... *Respondent* (*Petitioner*).

Rajah of Bobbili v. Ayyagari Sodemma.

Civil Procedure Code, S 2 (12)—Mesne profits—Decree fixing the amount in money or in grain—Decree silent as to interest—Power of executing Court to award interest

Where the decree in a suit fixes the amount of the mesne profits either in money or grain without leaving it to be determined in execution and contains no express provision as to payment of interest upon this amount, the executing Court has power to grant interest.

Harmanoje Narain Singh v. *Ramprosad Singh,* (1907) 6 C. L J 462, *Raman Menon* v. *Pangunni Menon,* (1926) 50 M L J 563 and A A O No. 74 of 1924 not followed

Appeal against the order of the Court of the Subordinate Judge of Vizagapatam, dated the 3rd day of December, 1925, in E. P. No. 44 of 1924 in O. S. No. 25 of 1916.

A. Krishnaswami Aiyar for appellant.

Y. Suryanarayana for respondent.

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*A A O No. 479 of 1925. 22nd March, 1927.

Rajah of Bobbili v. Ayyagari Sodemma.

Curgenven, J.

The Court delivered the following

JUDGMENTS :—*Curgenven, J.* :—This appeal is from the order passed by the Principal Subordinate Judge of Vizagapatam in E. P. No. 44 of 1924, which arose out of a suit filed by one Sodemma against the Maharajah of Bobbili for recovery of a certain land on the ground that it was granted to her husband, who was a Sheristadar of the Estate, as inam. The Subordinate Judge dismissed the claim, but on appeal to the High Court it was decreed. It is said that an appeal is now pending before the Privy Council. The execution petition was to recover mesne prolts for three years before suit and until delivery, or for the years 1913 to 1921. The decree awarded profits at the rate of 6 garces 27 putties per annum but did not fix the rate at which the grain was to be converted into money. This is one of the questions which now arises for decision. The only other question is whether the learned Subordinate Judge was right in awarding interest.

The arguments have dealt with three possible rates of conversion:

(*a*) the rate of Rs. 61-8-0 as claimed in the plaint,
(*b*) the takshish rate applicable to the Bobbili Estate,
(*c*) the market rate as recorded in the Gazette with or without any deduction.

Now as to (*a*) the first contention is that as the plaintiff named this rate in the plaint she cannot be allowed anything in excess of it. But that was a question for the Court which passed the decree, which was at liberty, if it thought fit, so to limit the claim. The executing Court cannot go behind the decree, and is only concerned with its true construction. The question we have to decide is this: the decree awarding to its holder 6 garces 27 putties of paddy per annum over a series of years, what is the correct equivalent in cash which the judgment-debtor should pay? The other argument for a rate of Rs. 61-8-0 per garce is that it is the commutation rate for estate jeroyiti lands, as fixed by a decree of this Court, since mesne profits of property is to consist "in those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received"—the question of interest will be considered later—it is urged that their measure must be what the judgment-debtor would as Zamindar have received for these lands as jeroyiti lands. There is, I think, no real basis for this argument, because it

loses sight of the fact that the property was not jeroyiti land at all, but inam land which the Zamindar had no right in as landholder. Admittedly the commutation rate, which was fixed with reference to prices prevailing over the years 1898 to 1908, is much below the average market rate for the period under reference, 1913 to 1921. Although no doubt the definition of "mesne profits" requires that the estimate should be based upon what the judgment-debtor, and not what the decree-holder, received or might have received, it certainly does not mean that regard must be had to any limitations or restrictions under which the judgment-debtor would have laboured, had the property been what he represented it to be. The plaintiff herself does not claim more than would be due to a person in possession of the property as a receiver of rent, and under the terms of the decree it must be as a receiver of rent in kind that the respondent's liability must be fixed.

There is, I think, little to be said in favour of (*b*), the takshish rate. This rate is said to have been fixed upon reports by the zamindari officials, but there is nothing to show that the figure given, Rs. 108-1-5, represents the true conversion rate over the period in question. In fact, the discrepancy between this rate and the market rates found in the Gazette suggests that the figure does not accurately reflect the prevailing prices.

There remains (*c*), the average market rate at Valkonda, Rs. 138-1-9, adopted by the Lower Court. The decree providing for a grain payment in respect of the mesne profits of each year, this is clearly, I think, the correct money equivalent to apply. The only further point is whether, since this rate prevailed at Valkonda whereas the payments relate to the village of Sankili, any deduction should be allowed. It appears that in fixing the general commutation rate for the Estate, a deduction of 15 per cent. from the rates at market centres was provided for, but there is nothing upon the record to show that any such deduction needs to be made here. It is not even alleged that Sankili is at such a distance from Valkonda as would materially affect the price of grain, or that the river which is said to run between the two places offers any obstacle to transport. In these circumstances, there do not appear to me to be grounds for interfering with the rate fixed by the learned Subordinate Judge, and I would confirm it.

There remains the question whether the executing Court was competent to grant interest, no express provision for in-

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terest being made in the decree. The argument addressed to us is that where a decree leaves the amount of mesne profits to be determined in execution, it may be open to the executing Court to allow interest, but that where the decree fixes the amount of the mesne profits, or even, as here, the amount of grain per annum, no such allowance can be made. As authority for this proposition we are referred in the first place to the decisions of two learned Judges of this Court each sitting singly, that of Madhavan Nair, J., in *Raman Menon* v. *Pangunni Menon* (1) and that of Wallace, J., in Appeal Against Appellate Order No. 74 of 1924. Mr. Justice Madhavan Nair refers with approval to two Calcutta cases, in which the proposition above stated has been accepted, and both learned Judges attach importance to the consideration that it may not be clear that in decreeing a certain amount, or a certain rate, of mesne profits the Court did not itself allow for interest by a consolidation of it with the principal. I do not think that there is any room for this latter view here, since what has been decreed is clearly and only the rental value in kind. It remains for consideration whether the Calcutta decisions relied upon by Madhavan Nair, J., correctly interpret the law. In *Harmanoje Narain Singh* v. *Ramprosad Singh* (2) the line of argument adopted is that where a Court ascertains the mesne profits and embodies the result in its decree, but omits to allow interest, it is not open to the executing Court to allow interest because (*a*) there is no rule which makes it obligatory upon the Court to allow interest on mesne profits, and (*b*) the Court which executed a decree must execute it as it stands. For proposition (*a*) there is other authority *Kishnanand* v. *Kunwar Partab Narain Singh* (3) and *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (4) and since the latter case is a decision of the Judicial Committee no question of its correctness arises for us. This same decision which the learned Judges distinguish is, as it appears to me, of great importance in approaching the consideration of proposition (b); but before turning to it advertence may be made to the other Calcutta case, *Narendra* v. *Byomkesh* (5). The decree there dealt with awarded the plaintiff compensation at a certain rate per annum for a certain period, without providing for

1. (1926) 50 M L J 563
2 (1907) 6 C L J 462 at 470 3. (1884) I L R 40 C. 785 (P. C.)
4. (1900) I L R 27 C. 951 : 101 M L J 356 (P C).
5. (1919) 30 C L J 205.

any interest, and the question was whether interest could be allowed in execution. It was contended that the expression "mesne profits" in S. 2, cl. 12 of the Code of Civil Procedure, included interest on such profits, and *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (4) was again cited in support of this proposition and again distinguished. There is some doubt whether the learned Judges treated the case as a claim to mesne profits at all, as they say that the term used throughout is not 'mesne profits' but 'compensation' but, except that the yearly amount due is fixed by the decree in money instead of in kind the decision may, I think, be taken as an authority in support of the appellant's contention.

Referring now to *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (4) it is quite true that the decree with which their Lordships had to deal left the amount of mesne profits to be ascertained in accordance with the provisions of S. 212 of the Code of 1882. The question is whether, had the decree fixed the amount or the rate, but made no reference to interest, their conclusion that interest could be added in the subsequent proceedings would have been affected. After referring to the option enjoyed by the Court to grant or withhold interest they proceed:

"But the question is, what is the effect of a decree which grants mesne profits and says nothing about interest, which, as their Lordships think, is the proper construction of the decree in this suit. The learned Judges treat that silence as equivalent to a decision that there be no interest. But then it is difficult to see what effect is given to the alteration made in S. 211 in the year 1882. Its obvious effect is to provide that a simple decree for mesne profits shall carry interest on them. No reason has been assigned for holding the true effect to be other than the obvious one. If the Court does not intend to give interest it should say so."

The only construction I can place upon these observations is that, unless the contrary be expressed, mesne profits are to bear interest. S. 196 of the Code of 1859 empowered the Court to provide in the decree for mesne profits with interest thereupon at such rate as the Court may think proper. This clearly required that the Court, if it allowed interest, should expressly say so. The Code of 1877 was the first to include, as an explanation to S. 211 of the Code of Civil Procedure, a definition of 'mesne profits', and, so far as the provision of interest is concerned, the language stood as it now stands in

4. (1900) I L R 27 C 951 . 10 M L J 356 (P C).

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S. 2 (12). The Code of 1882 reproduced the explanation unchanged. The point made by their Lordships therefore seems to be that an alteration of substance was made when the 1877 (but, as stated, the 1882) Code was enacted, and that interest, from being a relief which the Court had in terms to grant if it granted it at all, became, so to say, a normal component of mesne profits, to be in terms refused if it was not to be taken as impliedly granted. That is the impression which the language used conveys to my mind, and it is the impression, too, I gain from a consideration of the language of the definition itself. If the expression "mesne profits" is equivalent to "profits *plus* interest" it is surely no case of going behind the decree, which allows mesne profits, to allow interest, and if it is open to an executing Court to fix the rate at which a grain allowance is to be converted into cash, it may equally fix the rate at which interest should be allowed, once it is found that interest is admissible. I am unable to see how the validity of this argument is affected by the fact that the decree has determined the number of measures of grain at which the profits are to be rendered, once it is clear that this number includes no provision for interest. In *Lalta Prasad* v. *Sri Ganeshji* (6) this was the view taken by Walsh and Stuart, JJ., basing themselves upon the Privy Council judgment, in the case of a decree awarding a definite sum as mesne profits to the date of institution of the suit, and future profits at a certain rate per mensem. So far as I can see, the alternative position can only be maintained upon purely verbal grounds, that the expression 'mesne profits' in the decree, and therefore the amount awarded as such, by force of the definition necessarily comprises interest, whereas no such contention can in fact be advanced. It has only to be added that in the present instance no reason has been shown why the plaintiff should not be entitled to interest. I would therefore dismiss the appeal with costs.

In a memorandum of objections the respondent asks that the rate of interest allowed by the Lower Court should be raised to 12 per cent. The ground given is that certain estate Kadapas (Exs. VI and E) provide for such a rate upon arrears of rent. I do not think this affords sufficient reason for departing from the usual Court rate of 6 per cent. It is also objected that the Lower Court has disallowed the pleader's

6. (1922) I L R 44 A 579

fee in taxing the costs. The reason for doing this is not ascertainable here, and since the respondent might have sought redress from that Court, I do not think that we should make any order, and I would dismiss the memorandum of objections with costs.

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Odgers, J.

Odgers, J. :—This is an appeal by the Rajah of Bobbili against the order of the Principal Subordinate Judge of Vizagapatam. The plaintiff, one Sodemma, filed a suit against the Rajah of Bobbili and others for the recovery of possession of certain land which she claimed belonged to her family as inam. This was decreed in her favour by the High Court on 7th October, 1922. The decree ordered that, in respect of Neyyalapolem istuva, the respondent do pay appellants mesne profits at the rate of six garces and 27 puttis for three years before suit and till date of delivery of possession of the said Neyyalapolem istuva to the appellant. The plaintiff in her plaint claimed mesne profits at a commuted money rate of Rs. 61-8-0 per garce. The Judge has allowed the Gazette rate of about Rs. 138-0-0 per garce. I have had the advantage of reading the judgment just delivered by my learned brother and I agree with him on this point for the reasons stated in his judgment.

The more important point in this case is that of interest on mesne profits. The Judge allowed interest at 6 per cent. on the mesne profits decreed at the rate of 6 garces 27 puttis. The question is, is he right? Reliance has been placed for the appellant on the decision in *Harmanoje Narain Singh* v. *Ramprosad Singh* (2), a decision which has been followed in this Court in two decisions of single Judges, Madhavan Nair, J., and Wallace, J. In the Calcutta Law Journal Case, Mookerjee, J., distinguished the cases in *Grish Chander Lahiri* v. *Shoshi Shikareswar Roy* (4) and *Girish Chander Lahiri* v. *Sasi Sekhareswar Roy* (7). He said they were "no doubt authorities for the proposition that where a decree states that the plaintiff is entitled to mesne profits and says nothing about interest, if the amount of mesne profits is left for determination by the Court of execution, the decree-holder is entitled to interest upon the mesne profits and to have such interest added to the mesne profits when they are ascertained. But these cases do

2. (1907) 6 C L J 462.
4. (1900) L R 27 I A 110 : 27 C 951 : 10 M L J 356 (P. C.).
7. (1905) I L R 33 C 329.

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not lay down that, if the Court which ascertains the mesne profits has omitted to allow interest, it is open to the Court which executes the decree for mesne profits to allow interest in execution proceedings, on the principle that an executing Court must execute the decree as it stands". The learned Judge adds that there is no obligation on a Court to allow interest on mesne profits in which of course he is perfectly right. The portion of his judgment just quoted which I think calls for comment is the phrase "If the Court which ascertains the mesne profits has omitted to allow interest". As far back as 1843 in *Kirkland* v. *Modee Pestonjee Khoorsedjee* (8) the Judicial Committee upheld the practice of the Native Courts in Bombay in treating mesne profits as a judgment-debt and as carrying interest by its own force. In the Civil Procedure Code of 1859, S. 196, the Court might provide in the decree for payment of mesne profits till date of delivery of possession with interest thereon at such rate as the Court might think proper. In the Code of 1877, S. 211, the Court might provide in the decree for the payment of mesne profits with interest thereon at such rate as the Court thought fit; and in the explanation to the section mesne profits means those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, receive therefrom together with interest on such profits. This is the first appearance of the definition of mesne profits as embracing profits plus interest. The same explanation is repeated in S. 211 of the Code of 1882 and which in our present Code has been removed to S. 2 (12). The question, here, is whether we are to construe the words of the decree 'mesne profits at the rate of 6 garces 27 puttis' as inferring that the Court meant to disallow interest or that the Court has "omitted to allow interest" in the words of Mookerjee, J. In *Grish Chunder Lahiri* v. *Shoshi Shikareswar Roy* (4), the Judiciall Committee laid down that the Court has jurisdiction to give or refuse interest as it chooses, because mesne profits are in the nature of damages. The question, however, before them was as to the effect of a decree which granted mesne profits and said nothing about interest, the learned Judges in the Courts below having treated that silence as equivalent to a decision that there was to be no interest. Their Lordships point out that if that is to be the proper construction

8. (1843) 3 M I A 220.
4. (1900) I L R 27 C 951 at 967 · 10 M L J 356 (P C).

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of that silence, it is difficult to see what effect is given to the alteration in the law in the present Civil Procedure Code; and they say that the obvious effect of the alteration is to provide that a simple decree for mesne profits shall carry interest on them and that, if the Court does not intend to give interest, it should say so. If that decision is to be taken on the plain meaning of its language, there is no question but that interest should be allowed on the mesne profits awarded in this case. It is true that in the case under appeal to the Judicial Committee the Subordinate Judge commissioned an amin to report as to the amount of mesne profits and his successor made such report. But I doubt if it can be said that the amount of mesne profiits was there left for determination by the Court of execution, nor does the judgment of the Privy Council countenance any such distinction, it seems to me, as that drawn by Mookerjee, J., in *Harmanoji Narain Singh* v. *Ramprosad Singh* (2).

In the latter case, Wallace, J., quotes no authority but takes the law to be that when a Court has fixed a figure for mesne profits, it must be taken that that figure includes interest or rather that it cannot be said that it does not. With deference I think this view untenable in view of the pronouncement of the law by the Privy Council. In the former case the learned Judges expressly based this decision on *Harmanoji Narain Singh* v. *Ramprosad Singh* (2), and that decision of Wallace, J. *supra* dissents from the Allahabad decision which seems to me to be strictly in accordance with that of the Privy Council. I have already shown why the distinction pointed out in *Harmanoje Narain Singh* v. *Ramprosad Singh*(2)is untenable in view of the Privy Council decision. As Madhavan Nair, J., bases his judgment on that distinction, I must hold with respect that it is wrong. I am therefore constrained to differ from the judgments of both the learned Judges. The two Madras authorities are *Raman Menon* v. *Pangunni Menon* (1) and the unreported case A. A. O. No. 74 of 1924. In *Radharaman Munshi* v. *Surnomoyi Debi* (9) the learned Judges held that, on the wording of S. 212 of the Code of 1882, the decreeholder is entitled to receive interest year by year on the amount of mesne profits found due. The Subordinate Judge there declined to award such interest but awarded the

1. (1926) 50 M L J 563. 2. (1907) 6 C L J 462.
9. (1903) I L R 30 C 506.

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decree-holder only 6 per cent. from the date of his decree on the amount excluded therein. The words, according to the learned Judges, of the Code do not refer to interest due after the ascertainment of the mesne profits due under the decree but they contemplate that interest should form a separate item in the calculation of the amount due as mesne profits. There also a Commissioner was appointed to ascertain the amount of mesne profits.

Girish Chander Lahiri v. *Sasi Sekhareswar Roy* (7) was a further appeal by some of the parties, the same case as that which went to the Privy Council reported in 27 C. 951. In this case it was held that where nothing is said about interest and the amount is left for determination in execution the decree-holder was entitled to interest on the mesne profits until such mesne profits are actually paid by the judgment-debtors. In a recent decision of the Allahabad High Court, *Lalta Prasad* v. *Sri Ganeshji* (6), it was held that where a decree for mesne profits is silent as to interest thereon, the decree-holder is entitled to realize in execution interest at the usual rate of 6 per cent. There the mesne profits were awarded in the decree and in execution interest was claimed on the entire amount, *i. e.*, of past and future mesne profits. The learned Judges treat the Privy Council decision in *Girish Chander Lahiri* v. *Shoshi Shikhareswar Roy* (4) as of unrestricted application and decided accordingly. It appears to me therefore with great respect to Mookerjee, J., and the two learned Judges of this Court who based their decision on the ruling in *Harmanoj Narain Singh* v. *Ram Prasad Singh* (2) that the distinction made by the Calcutta Judge cannot be maintained, and that, if a Court wishes, as it is perfectly at liberty to do, to avoid the plain meaning of the explanation of mesne profits, *i. e.*, profits plus interest, it must definitely say so. Otherwise the award of mesne profits will be taken also to include interest on those profits.

As regards the Memorandum of Objections, I agree with the judgment of my learned brother.

I would therefore dismiss the Appeal and Memorandum of Objections both with costs.

N. S. *Appeal dismissed.*

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2. (1907) 6 C L J 462. 4. (1900) I L R 27 C 951 : 10 M L J 356 (P C).
6. (1922) I L R 44 A 579. 7. (1905) I L R 33 C 329.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Rangoon.]

PRESENT :—LORD PHILLIMORE, LORD CARSON, LORD DARLING, MR. AMEER ALI AND SIR LANCELOT SANDERSON.

Ma On ... *Appellant**

v.

Maung Tin ... *Respondent.*

P. C.
Ma On
v.
Maung Tin.

Burmese Law and Custom—Woman deceased—Jewellery worn by—Her ownership of—Evidence—Dead body of woman—Jewellery placed on—Presumption from

The suit was by a Burman husband for recovery from the defendant of certain jewelleries which the plaintiff alleged belonged to his deceased wife of which the defendant, her maternal aunt, took possession on her death. The plaintiff's case was that the suit jewels were presented to his wife as a dowry at the time of her wedding by her grandmother. The defendant alleged, *inter alia,* that the jewellery the plaintiff's wife used to wear were merely lent to her by her grandmother, and that they therefore did not belong to her.

The learned Judges of the High Court, who held that the jewellery claimed by the plaintiff was the property of his deceased wife, summed up the result of the evidence as follows:—"The mere fact that the plaintiff's wife wore the jewellery at her wedding would not go far towards proving that the jewels were hers, because Burmans habitually borrow jewellery for great occasions. But her continued possession of the jewellery and her taking it away with her when she went to live at the various places to which her husband, as a Government servant, was transferred, would raise a strong presumption that it was hers, particularly as her grandmother, to whom it is said to have belonged was rather miserly, and would not be likely to let her own valuables go out of her possession for anything like so long a time".

Held that, whatever might have been the origin of the articles, whether they were originally purchased by the grandmother and were given by her by way of dowry to the plaintiff's wife at or about the time of the wedding, the evidence in the case fully justified the conclusion arrived at by the High Court.

Held, further, that the fact that on the death of the plaintiff's wife considerable jewellery was placed on her dead-body, in the circumstances of the case, gave rise to the inference that it was her own, as it was hardly likely that borrowed jewellery would be placed on the dead-person.

A. M. Dunne K. C. and *E. B. Raikes* for appellant.

Respondent *ex parte.*

28th February, 1927. The Judgment of their Lordships was delivered by

Mr. Ameer Ali.

MR. AMEER ALI.—This appeal arises out of a suit brought by the plaintiff, Maung Tin, on the 21st February, 1923, in the

*P. C. Appeal No. 118 of 1925. 28th February 1927.

P. C.

Ma On v. Maung Tin.

Mr. Ameer Ali.

Court of the District Judge of Tharrawaddy in Burma. The action is for recovery from the defendant, Ma On, of certain jewelleries which he alleged belonged to his wife, Ma Saw Yi, of which the defendant took possession on her death at Letpadan on the 18th February, 1920. The defendant, Ma On, who is the maternal aunt of the deceased Ma Saw Yi, and who admittedly was, at the time of Ma Saw Yi's death, at the house in which she died, denies taking possession of the jewellery claimed by the plaintiff, and further alleges that the jewellery the deceased girl used to wear was merely lent to her by different people, among them her grandmother Daw U.

The house in which Ma Saw Yi died belonged to Daw U and, as already stated, the defendant was there at the time of her death.

It appears to be the custom among Burmans to give the brides, at the time of marriage, jewellery by way of a dowry; and it is the plaintiff's case that the jewellery his wife was wearing at her wedding, which was of considerable value, was either her own or was given to her by her grandmother Daw U, according to the evidence on both sides, a wealthy woman. It is further the plaintiff's case that on his wife's death some jewellery was placed on her dead body, as appears to be the custom among Burmans; and that a photograph was taken of her with the jewellery in which she was dressed. The defendant admits that jewellery was placed on the dead body, but alleges that it was borrowed for the purpose.

The suit came for trial before the District Judge Mr. Gilbert. His conclusion on the evidence may be given in his own words as follows:—

That Ma Saw Yi was in possession of a considerable outfit of jewellery while she was living with Maung Tin, after the marriage, in the various stations to which he was posted is clearly proved. U Thein (4 P. W.) was a neighbour of Maung Tin at Tharrawaddy, and often saw Ma Saw Yi wearing diamond earrings, studs, bracelets, hairpins and a ring. Ma Ma Le (5 P. W.), when visiting Ma Saw Yi at Tharrawaddy, saw her wearing such jewellery; so did Ma Mya Gyi (6 P. W.) and Ma Yu Kin (7 P. W.), and Naung Gyi (9 P. W.). At Maymyo Daw Ein Zi (15 P. W.), when staying a fortnight with Maung Tin and Ma Saw Yi, saw Ma Saw Yi wearing this jewellery Ma Saw Yi spoke of them (the ornaments) as hers. Ba Bwa (11 P. W.), who used to live next door to Maung Tin at Maymyo, says that Maung Tin, when he went on tour, used to ask witness to look after this jewellery. Ma Saw Yi told witness that it was hers. Ba Bwa says he used to lock the things up in a safe at Maung Tin's house, while Maung Tin was away, and sleep there. Ma Ein Zi, though Maung Tin was away on tour during part of a visit, did

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Mr. Ameer Ali.

not encounter Ba Bwa—which at first sight seems to contradict Ba Bwa's statement. But it is probable that Ma Saw Yi, having a companion on this occasion did not feel the need of protection, and this would account for Ba Bwa's absence during Ma Ein Zi's stay at Maymyo. There is no reason to doubt the evidence that Ma Saw Yi was possessed of much jewellery while she was with her husband at Tharrawaddy and Maymyo.

Then comes the following passage:—

The inherent vagueness of this case lies really in the fact that no attempt has been made by either party to trace the history of this jewellery, and show who was its purchaser or owner in the first instance. Plaintiff's case in effect rests on the bare fact that Ma Saw Yi after her marriage was in possession of a set of jewellery, and that the mere proof of possession is in itself adequate to raise a presumption of ownership. But this presumption is a weak one, since it is quite clear that Ma Saw Yi and her husband were never in a position to purchase these articles; and, in fact, it is not alleged that they did acquire them in any such manner. Maung Tin relies on an alleged gift. Neither the fact of this gift is proved, nor was the title of the alleged donatrix established. The weight of evidence in the case goes to show that these jewels were owned by Daw U and that, though Daw U was willing to lend them, she was averse to making an outright gift of them. Daw Me's ownership of these jewels is not proved and cannot be inferred. There was, of course, every prospect at the time of the marriage that ultimately Ma Saw Yi would get these or similar articles by way of inheritance, and at Maymyo she even spoke of them as hers. But the mortality of Daw U, and her daughter Daw Me, and Daw Me's daughter Ma Saw Yi, followed a chronology which was the exact reverse of the expected sequence of deaths. The result of this was Ma Saw Yi died without acquiring title.

I think that Maung Tin has failed to establish his claim to this jewellery. I have already dealt with the question of the cash.

In this view of the case the District Judge dismissed the plaintiff's suit. The plaintiff appealed to the High Court at Rangoon, and the appeal was heard by two learned Judges, one of them being Mr. Justice Heald and the other Mr. Justice Chari. Mr. Justice Heald has considerable experience of Burmese customs and institutions; his opinion on the respective allegations of the parties to the suit is of considerable value. He says, in the first place, that it is admitted by the respondent herself that Ma Saw Yi took the jewellery away with her when she left home and went to live with the plaintiff at Tharrawaddy, and that she had jewellery in her possession until she returned home ill not long before her death. He refers also to the admission of the defendant's sister Ma Gun and her witness Ma Thin Za that the jewellery Ma Saw Yi took with her to Tharrawaddy was the jewellery she wore at her wedding. He further refers to the fact that admittedly Ma Saw Yi took the jewellery that was in her possession to different places where

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her husband proceeded in the course of his official duties, such as Rangoon and Maymyo. The learned Judge adds that the defendant herself admits this, and her sister Ma Gun says that she took all the jewellery she had with her to Rangoon. He goes on to say as follows:—

"It is admitted that when Ma Saw Yi died her dead body was decked with jewellery, and there is some presumption that it was the jewellery which she had worn while she was alive."

"It is noticeable," he observes further, "that the articles of jewellery which were admittedly put on her correspond with the jewels which she had worn."

It is admitted that after the funeral the plaintiff asked for his wife's jewellery but was told that it did not belong to his wife, but to her grandmother. The comment of this learned Judge upon this statement is as follows:—

"I have no doubt that she did say so. The wife's relations would naturally resent her valuables going to a stranger. They nearly always do in such cases, and it is probable that that resentment is the sole reason for this litigation."

The learned Judge sums up the result of the evidence in the following words:—

"The mere fact that Ma Saw Yi wore the jewellery at her wedding would not go far towards proving that the jewels were hers, because Burmans habitually borrow jewellery for great occasions. But her continued possession of the jewellery and her taking it away with her when she went to live at the various places to which her husband, as a Government servant, was transferred, would raise a strong presumption that it was hers, particularly as her grandmother, to whom it is said to have belonged was rather miserly, and would not be likely to let her own valuables go out of her possession for anything like so long a time."

In the result, the High Court made a decree for the plaintiff for various articles of jewellery, amounting in value to Rs. 20,000, with costs in both Courts.

Their Lordships have heard the defendant's counsel at considerable length; it is clear from the judgment appealed against that the learned Judges carefully examined the evidence on both sides, and their conclusion that the jewellery claimed by the plaintiff was the property of his deceased wife, and had been taken possession of by the defendant, is, in their Lordships' opinion, fully borne out by the circumstances. It is impossible to believe that Ma Saw Yi would have been allowed by the old grandmother, who was proved to have been a close-fisted woman, to take with her all the jewellery to the different places to which her husband was from time to time posted, unless this jewellery belonged to the deceased. Whatever might

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Ma On v. Maung Tin.

Mr. Ameer Ali.

have been the origin of the articles, whether they were originally purchased by Daw U and were given by her by way of dowry to the plaintiff's wife at or about the time of the wedding, there can be no doubt on the evidence, which has been carefully analysed by the Judges of the High Court, that the deceased possessed them as her own property, and took them about as her own property. When she was in Rangoon, and her husband was away touring, the articles were taken care of by a neighbour who has given evidence on behalf of the plaintiff, and he says that it was at the plaintiff's request that he took care of his wife's jewellery. The inference which the High Court has drawn from the fact that on her death considerable jewellery was placed on her dead body is not without force in the circumstances of the case. It is hardly likely that borrowed jewellery would be placed on the dead person, and that seems to be the view of the learned Judge, to whose experience of Burma and Burmans the Board have referred to before.

On the whole, their Lordships see no reason to disturb the finding of the High Court, and would, therefore, humbly recommend to His Majesty that this appeal should be dismissed. There will be no costs, as the respondent does not appear.

Solicitors for appellant : *Douglas, Grant & Dold.*

Respondent : *Ex parte.*

FULL BENCH.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS, MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

Muthu Balu Chettiar and others ... *Petitioners** (*Accuseds*)

v.

The Chairman, Madura Municipality, Madura ... *Respondent* (*Complainant*).

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Muthu Balu Chettiar v. Chairman, Municipality, Madura.

Madras District Municipalities Act (V of 1920), Ss. 249 and 250—Scope of—Person owning and working a rice-mill—Rice-mill found to be dangerous to human life and health—Permission obtained under S 250 for construction of machinery—Necessity for taking out annual license under S 249—Rules framed under an Act—Criminal Court—Jurisdiction to determine validity of the rules—Criminal Procedure, Ss. 437 and 439—Reference to High Court—One Bench of High Court returning the reference in connected cases but not finally disposing of the case—Jurisdiction of another Bench to try the case.

A person who owns and works a rice-mill which is found to be dangerous to human life and health is bound to take out an annual license under

*Cr. R. Cases Nos. 48, 49 and 162 to 179 of 1927. 6th May, 1927.
(Cr. R. Petns. Nos. 42, 43 and 144 to 161 of 1927).

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S. 249 of the Madras District Municipalities Act, in spite of the fact that he has already obtained a permission under S. 250 for the construction or establishment of the machinery. The permission under S. 250 of the Act is given solely for the construction establishment or installation and the section does not deal with the user of the places but deals only with their inception. When the owner wishes to use them, Section 249 becomes applicable.

Muthu Balu Chetti, In re, (1926) 51 M L J 490 *followed.*

Madura Municipality v. *Muthu Balu Chetty,* (1926) 50 M L J 384, *overruled.*

Where rules have been framed under a section of an Act and a person is charged with an offence under these rules, it is not within the province of a Criminal Court to determine whether such rules have been validly framed, a matter which should be left for determination in a Civil Court.

Where a Criminal Case was referred to the High Court by a Sessions Judge and the Bench of the High Court which heard the case did not finally dispose of it but returned the reference in the other connected cases to the Sessions Judge and asked him to deal with them in the light of their judgments,

Held, that another Bench of the High Court, constituted by the Chief Justice, had jurisdiction to proceed with the trial of the case which was not already disposed of.

Quaere :—Whether under the very wide powers given by S 439 of the Criminal Procedure Code the High Court cannot *suo motu* interfere in a case of this sort where final orders had not been already passed.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, *viz.,* Criminal Revision Cases Nos. 48, 162, 164, 168, 170, 172, 174, 176, and 178 of 1927 praying the High Court to revise the orders of the Court of the 1st Class Bench of Magistrates, Madura Town, in Summary Cases Nos. 975 of 1924, 552, 1211 and 1615 of 1924, 535 and 1288 of 1924, 536 and 1328 of 1924, 553 and 1620 of 1924, 577 and 819 of 1924, 926 of 1924, 1296 of 1924, 240 of 1925 and 1501 of 1924 and 1619 of 1924 and Criminal Revision Cases Nos. 49, 163, 165, 167, 169, 171, 173, 175, 177, and 179 preferred against the orders of the Court of Session of Madura Division in Criminal Revision Petitions Nos. 49, 70, 71 and 72, 51 and 52, 53 and 54, 55 and 56, 57 and 58, 59, 64, 75 and 76 and 65 of 1925, (preferred respectively against the said Summary cases).

T. V. Muthukrishna Aiyar and *V. Sundaresa Aiyar* for petitioners.

Public Prosecutor for the Crown.

F. S. Vas for respondent.

The Court made the following

ORDER :—The petitioners have been convicted by the Bench Magistrates of Madura for failing to take out a license

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Muthu Balu Chettiar v. Chairman, Municipality, Madura.

under S. 249 of the Madras District Municipalities Act and have now put in a petition asking for a revision of that order. The offence of which the petitioners have been convicted is that of failing to take out an annual license for the rice mills owned and worked by them on the ground that a rice mill is a place used for the purposes specified in Sch. V, cl. (*q*) of the Act, namely, "using for any industrial purposes any fuel or machinery or doing in the course of any industrial process anything which is likely to be dangerous to human life or health or property". The contention for the petitioners is that when a permission to construct or establish a factory or instal in any premises any machinery, etc., has been obtained under S. 250 of the Act, no annual license under S. 249 need be obtained as the two sections are mutually exclusive. This is the view taken by a Division Bench of this Court (Devadoss and Waller, JJ.) in *Madura Municipality* v. *Muthu Balu Chetti* (1), whereas the contrary view was taken in *In re Muthu Balu Chetti* (2) by Odgers and Madhavan Nair, JJ. These petitions have therefore been placed before this Bench for a decision on the question. Waller, J., was of opinion that a distinction is drawn in the Act between industries and factories, the former being dealt with in S. 249 and the latter in S. 250, and based this view to a great extent upon the supposed anomaly that the contrary view would mean that when a Municipal Council had granted permission for the erection of a factory under S. 250 it would be open to the Chairman to refuse a license for its subsequent working. The anomaly is more apparent than real, for the Chairman's decisions under S. 249 are subject to an appeal to the Council.

When the sections are closely examined, it is apparent that S. 249 is much wider than S. 250; for, it purports to deal with 'any place' which is used for any one or more of the purposes specified in Sch. V and the word "place" certainly includes a factory or workshop, for Sch. V undoubtedly includes some factories. The word 'place' therefore must be taken to include not only a factory, workshop, or work place as mentioned in S. 250, cl. 1 (*a*) but any other place used for the purposes mentioned in Sch. V. S. 250 clearly applies only to factories, workshops or work-places in which it is proposed to employ steam-power, water-power or other mechanical-power or electrical-power, or places in which any machinery or manufacturing plant driven by steam, water or other power is installed. The

1. (1926) 50 M L J 384. 2. (1926) 51 M L J 490.

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places referred to in S. 250 are those of a more important character, and before any person can construct or establish any such factory he is bound to get the permission of the Council to do so. That permission is given solely for the construction, establishment or installation, as is also apparent from cl. 5 of the section which says that the provisions of S. 197 dealing with new buildings shall not be deemed to be dispensed with. S. 250 does not deal with the user of such places but only with their inception. When the owner wishes to use them, and they are such as come within Sch. V, cl. (*q*), S. 249 becomes applicable and the owner must take out an annual license from the chairman of the Council. This is the view that was taken by Odgers and Madhavan Nair, JJ., and we think that this is certainly the correct view.

The question of whether a rice mill is likely to be dangerous to human life or health or property within the meaning of Sch. V, cl. (*q*), does not arise in these cases, for it has been found as a fact that the rice mills in question are dangerous to human life and health. It is consequently unnecessary to go into the further question of whether the words in that clause "which is likely to be dangerous to human life or health" govern the words "any fuel or machinery" or not.

There is one other point on which it is desirable to express an opinion, for it was argued before us, and that is whether a Magistrate should take cognizance of a plea raised in a case of this kind questioning the validity of the order disobeyed by the accused. The offence charged is under S. 338 of the Act and consists of using the rice mill without the license prescribed by any rule, by-law or regulation made under the Act. The necessary rules have been framed in this case and it is not within the province of a Criminal Court to determine whether such rules have been validly framed, a matter which should be left for determination in a Civil Court.

Mr. Vaz on behalf of the Municipal Council raised a preliminary point that this Bench has no jurisdiction to try these cases. The petitioners applied to the Sessions Judge of Madura to refer them under S. 437, Criminal Procedure Code, to this Court and they are the cases dealt with by Odgers and Madhavan Nair, JJ. Instead, however, of finally disposing of these cases they returned the reference in the connected cases to the Sessions Judge and asked him to deal with them in the light of their judgments. The Sessions Judge has accordingly dismissed all these petitions. Now the petitioners

come again before this Court, some impeaching the original order of the Bench Magistrates and some the final order of the Sessions Judge. So far as the Sessions Judge's order is concerned, it is clearly open to revision by this Court and it is competent to us to deal with those cases. As regards the other petitions dealing directly with the Bench Magistrates' order it cannot be said that the question is *res judicata,* for they were not finally disposed of by the Bench which has already heard them. Even if a case has been heard by one Bench, but is not finally disposed of, it is open to the Chief Justice to ask another Bench to proceed with the trial of the case, and that has been done in the present case. Apart from this it is questionable whether under the very wide powers given by S. 439 of the Criminal Procedure Code this Court cannot *suo motu* interfere in cases of this sort where final orders have not already been passed by it. We think that the convictions by the Bench Magistrates are correct and the petitions are all dismissed.

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Muthu Balu Chettiar v. Chairman, Municipality, Madura.

N. S. *Petitions dismissed.*

FULL BENCH.

PRESENT :—SIR WILLIAM PHILLIPS, *Officiating Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Daivanayaga Reddiar, and others ... *Appellants** (*Defts.*)

v.

Renukambal Ammal ... *Respondent* (*Plaintiff*).

F. B.
Daivanayaga Reddiar v. Renukambal Ammal.

Appeal—Forum—Valuation of suit more than Rs 5000 on date of plaint according to Court-Fees Act—Subsequent amendment of the Court Fees Act—Valuation less than Rs. 5000 according to the amended Act—Appeal if lies to the High Court or District Court

An appeal against the decree in a suit in which the valuation of the relief claimed according to the Court-Fees Act in force at the date of the plaint was more than Rs. 5000, but at the time of the appeal is less than Rs. 5,000 owing to the amendment of the Court-Fees Act, lies to the High Court and not to the District Court.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in O. S. No. 11 of 1921.

T. Rangachariyar for 1st appellant.

E. V. Sundara Reddiyar for all appellants.

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*Appeal No. 226 of 1923. 19th August 1927.

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A. Krishnaswami Aiyar, K. V. Krishnaswami Aiyar and *N. S. Srinivasa Aiyar* for respondent.

The Court (Kumaraswami Sastri, J. and Devadoss, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—The respondent's vakil takes the preliminary objection that the appeal does not lie to the High Court but to the District Court. The plaintiff, a widow, claimed maintenance at the rate of Rs. 100 a month including value of clothes, etc., and valued her claim in the plaint at ten times the amount payable for one year under S. 7, cl. (2) of the Court-Fees Act. She also claimed past maintenance and a house to reside in. The total value of her claim according to the plaint is Rs. 14,600. The Subordinate Judge of Cuddalore gave her a decree for maintenance at Rs. 60 a month together with past maintenance. He also decreed that she should be given possession of a house for her residence during her life. The defendants have preferred this appeal against the decree of the Subordinate Judge. In their appeal they have valued the relief for maintenance at the amount allowed for one year under the Court-Fees Amendment Act, S. 5. The total value of the appeal together with the past maintenance and the value of the house is Rs. 2,633-5-4. The respondent's vakil contends that though the suit was valued at more than Rs. 5,000 under the law in force at the time of the filing of the plaint, yet the valuation of the suit according to the amended Court-Fees Act at the time the appeal was presented would have been less than Rs. 3,000 and therefore the appeal to this Court is incompetent. But for the amendment of the Court-Fees Act the appeal would have been valued at Rs. 14,6000, as in the plaint. It is admitted that the monetary jurisdiction of the Court is determined by the value of the claim in the plaint and not by the value of the relief decreed. Under S. 13 of the Madras Civil Courts Act III of 1873, "when the amount or value of the subject-matter of the suit exceeds Rs. 5,000, the appeal shall lie to the High Court." It is urged that the subsequent change in the law as to valuation makes the value of the relief in the plaint less than Rs 5,000 and therefore the appeal lies only to the District Court, and reliance is placed for this contention upon two recent decisions of this Court in A. S. No. 32 of 1924 and in A. S. No. 415 of 1923.

In A. S. No. 32 of 1924, Ramesam and Jackson, JJ., held that the appeal lay to the High Court against the decree in

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a suit in which the relief claimed was valued at less than Rs. 5,000 according to the Court-Fees Act before its amendment by the Madras Act V of 1922 but which had to be valued at more than Rs. 5,000 under the amended Act. The learned Judges relied upon *Muttammal* v. *Chinnana Goundan* (1) and the proceedings of the High Court in 5 M. H. C. R., Madras High Court Rulings, XLIV. This case is converse to the present one. The point now raised was decided in A. S. No. 415 of 1923 which was also a suit for maintenance and Phillips and Odgers, JJ., held, following the decision in A. S. No. 32 of 1924, that the appeal did not lie to the High Court as according to the valuation under the amended Court-Fees Act, the relief claimed in the plaint was less than Rs. 5,000. In *Muttammal* v. *Chinnana Goundan* (1) the plaintiff sued to recover one-eighth of a mitta and obtained a decree. The defendant resisted the execution of the decree and claimed to be in possession of the lands as purchaser at a Court-sale in execution of another decree. His objection was disallowed by the District Munsif and on appeal the District Judge upheld the decision of the District Munsif. The High Court set aside the order of the District Munsif and the District Judge and the petition was registered as a suit under the directions of the High Court. The District Munsif gave a judgment in favour of the defendant. The plaintiff appealed to the High Court. The first ground of appeal was that the District Munsif had no jurisdiction because the value of the property in dispute was Rs. 9,000. A preliminary objection was taken by the respondent that no appeal lay to the High Court. Kindersley and Muthuswami Aiyar, JJ., overruled the objection and observed "We think that the subject-matter in appeal should be valued for the purpose of jurisdiction according to the law in forec at the date of the appeal and not of the suit which led to it." They held that according to the law in force at the date of the appeal, the subject-matter of the suit exceeded Rs. 5,000 in value and there fore whether the District Munsif had or had not jurisdiction the appeal lay to the High Court. By proceedings, dated the 15th of November, 1870, the High Court gave this ruling: "The High Court are of opinion that the valuation of an appeal must be according to the Act in force at the time of its presentation, and that the original valuation under a law obsolete

1. (1881) I L R 4 M 220.

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at the period of appeal can have no influence on the decision." (5 M. H. C. R., Madras High Court Rulings, XLIV)..

We should have felt bound to follow the decision in *Muttammal* v. *Chinnana Goundan* (1) and the two recent decisions in A. S. No. 32 of 1924 and A. S. No. 415 of 1923, but for the high authority of Lord Macnaghten who delivered the judgment of their Lordships of the Privy Council in *Colonial Sugar Refining Company* v. *Irving* (2). In that case an appeal was presented to the Privy Council against the decision of the Supreme Court of Queensland. During the pendency of the suit in the Supreme Court, the Judiciary Act of 1903 was passed and by S. 39, sub-section 2, the right of appeal to the Privy Council from the decisions of the Supreme Court was taken away but a right of appeal was given from the Supreme Court to the High Court of Australia. The respondent moved the Privy Council by a petition to have the appeal dismissed on the ground that the appeal did not lie as of right to the King in Council. Their Lordships rejected the petition holding that the matter was not one of procedure only but one touching a right in existence at the passing of the Act and that "the Judiciary Act was not retrospective by express enactment or by necessary intendment." Lord Macnaghten observed "The only question is, was the appeal to His Majesty in Council a right vested in the appellant at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belongel to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

It does not appear that this decision was brought to the notice of the learned Judges who decided the two appeals in A. S. No. 415 of 1923 and A. S. No. 32 of 1924.

An appeal to a certain forum is a vested right. It cannot be denied that an appeal to the High Court on facts is considered to be a very valuable right and it cannot be taken away

1. (1881) I L R 4 M 220. 2. L R (1905) A C 369.

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except by an express statute. The present suit was valued at more than Rs. 5,000 and if the suit was decided on the date it was filed, namely, 21st March, 1921, there would have been no question as to the maintainability of the appeal in the High Court. The Court-Fees Act is only a fiscal enactment and in most cases the valuation for purposes of jurisdiction is the same as that for purposes of court-fees. The jurisdiction value determines the forum for the appeal and the right of appeal to the High Court which either party to the suit had on the date of the plaint and some time after cannot be taken away by an enactment which amends some of the provisions of the Court-Fees Act for the purpose of charging court-fees. As the decisions in A. S. No. 32 of 1924 and in A. S. No. 415 of 1923 are not reconcilable with the observations of their Lordships of the Privy Council in *Colonial Sugar Refining Company* v. *Irving* (2), to which the attention of the learned Judges does not seem to have been directed, and as the point is of considerable importance and is likely to arise in many cases, we refer the following question to the Full Bench:—

"Does the appeal against the decree in a suit in which the valuation of the relief claimed according to the law in force at the date of the plaint was more than Rs. 5,000, but at the time of the appeal is less than Rs. 5,000 owing to the amendment of the Court-Fees Act, lie to the High Court or to the District Court?"

E. V. Sundara Reddiyar for appellants.

K. V. Krishnaswamy Aiyar and *Mr. N. S. Srinivasa Aiyar* for respondent.

The Court expressed the following

OPINION :—The question that has been referred for decision is, "Does the appeal against the decree in a suit in which the valuation of the relief claimed according to the law in force at the date of the plaint was more than Rs. 5,000, but at the time of the appeal is less than Rs. 5,000 owing to the amendment of the Court-Fees Act, lie to the High Court or to the District Court?"

This question has been referred to us because there are two unreported decisions of this Court which hold that the valuation must be determined according to the amended Act and, according to that valuation, the appeal will lie either in the High Court or in the District Court. In neither of these cases was any reference made to the decision of the Privy

2. L R 1905 A C 369.

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Council in a case from Queensland, *Colonial Sugar Refining Company* v. *Irving* (2). In that case in certain suits a right of appeal to the Privy Council was given by an Ordinance of 1860. Subsequently by the Judiciary Act of 1903 the decision in those suits was held to be final subject to an appeal to the High Court of Australia. The question for decision was whether in a suit filed before the passing of the Judiciary Act of 1903 the appeal still lay to the Privy Council or to the High Court in Australia, and it was held that the new enactment could not take away a vested right, unless in express terms it had retrospective effect. The remarks of Lord Macnaghten in his judgment are entirely applicable to the present case.

"To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal".

This clearly disposes of the point before us, for the question is whether the amendment of the Court-Fees Act which came into force after the present suit was filed would deprive the Plaintiff of a right of appeal to this Court which he had when he filed the suit. Under S. 13 of the Civil Courts Act, appeals from subordinate Courts lie either to the District Court or to the High Court, according to whether the value of the subject-matter of the suit is over or below Rs. 5,000. It is argued that this section does not confer any right of appeal to the High Court in definite classes of suits, but that the right of appeal is merely given to the Court authorized to hear appeals and the question of whether that Court is the District Court or the High Court depends on the valuation of the suit at the time of filing the appeal. It is difficult to treat this argument as in any way distinguishing the case from that in *Colonial Sugar Refining Company* v. *Irving* (2), for in both cases there was, when the suit was filed, a vested right of appeal to a particular tribunal, which is taken away by a subsequent enactment. According to the argument, when the right is taken away by a subsequent alteration in a mere fiscal enactment, the case is not the same as when the right depends on substantive law. This is untenable. It has been held by the Privy Council that this cannot be done and we are bound by that general expression of the law and must follow it. We may also

2. L R 1905 A C 369.

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refer to a case decided in *Ratanchand Shrichand* v. *Hanmantrav Shivbakas* (3), where the same principle was enunciated.

Respondent relies on some observations in *Canada Cement* Co.v.*East Montreal (Town of)* (4). These observations do seem to give some support to the contention that a right of appeal can be taken away by a subsequent enactment, but there is no decision to that effect and no reference whatever to the previous decision of the Court in *Colonial Sugar Refining Company* v. *Irving* (2). The observation is obiter and can, therefore, have no force as against the prior decision which we must follow.

The answer to the question before us may also be put upon another ground and that is that the forum of appeal from a Subordinate Judge's Court depends on the value of the subject-matter of the suit. Presumably the value of the subject-matter of the suit is its value at the time of filing. Such value has to be set forth in the plaint and Court-fees paid accordingly. It is, however, contended that the value varies according to the particular enactment in force at the time; and that, although it may have a particular value when it is filed, the value of the suit can be changed if the law in respect of valuation is altered. This contention was distinctly negatived so long ago as in *Muthusami Pillai* v. *Muthu Chidambara Chetti* (5), where it was held that it is the money value of the original suit that fixes the jurisdiction throughout the subsequent litigation in its several stages. If this is so, the value of the subject matter of the suit is the same throughout and it cannot be altered after the decree has been passed simply by an alteration in a fiscal enactment. To hold otherwise would lead to very great difficulties in the question of jurisdiction. A suit which when filed was within the jurisdiction of the District Munsif might subsequently become one which must necessarily be filed in a Subordinate Court or *vice versa*.

For both these reasons, therefore, we hold that in the suit referred to, the appeal lies to the High Court.

N. S. *Reference answered.*

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2. L R 1905 A C 369.
3. (1869) 3 Bom. H C R 166. 4. L R 1922 1 A C 249 at p. 254.
5. (1874) 7 M H C R 356.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

Dhanabakkiyammal ... *Appellant** (*Petitioner*).

v.

Thangavelu Mudaliar and others ... *Respondents* (*Respt. and others—Executors*).

Dhanabakkiyammal *v.* Thangavelu Mudaliar.

Indian Succession Act (XXXIX of 1925), S. 301—Application for removal of executor—If the sole remedy—Suit if lies—Power of Court—Discretion—Arbitrary or Judicial—Court dismissing application without any enquiry—Legality of order.

If the removal of an executor is sought and not an indirect restraint on him by merely getting the appointment of a receiver, the only remedy that is open is an application under S. 301 of the Indian Succession Act, and not a suit. The use of the word "may" in the section shows merely that a proper case must be made out and the Court shall act only if a proper case is made out. To that extent the power vested in a Court under this section is discretionary but the discretion is not arbitrary but it is judicial discretion.

In an application under the section, the Court ought to enquire into the allegations made by the petitioner; it is not open for the Court to dismiss the application without any kind of enquiry into the allegations made. If on enquiry the Court holds that the facts proved do not make out a proper case, it may dismiss the petition.

Appeal from the judgment and order of the Hon'ble Mr. Justice Srinivasa Aiyangar, dated the 5th October, 1926, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court and made in O. P. No. 117 of 1926.

K. S. Krishnaswami Aiyangar and *M. S. Venkatarama Aiyar* for appellant.

S. Duraiswami Aiyar and *J. A. Pinto* for respondents.

The Court delivered the following

JUDGMENT :—This is an appeal against an order of our brother Srinivasa Aiyangar, J., dismissing an application under S. 301 of the Indian Succession Act, XXXIX of 1925, to remove the executor Thangavelu Mudaliar appointed under the will of Vaidyalinga Mudaliar, dated the 21st Oct., 1925. An interim order appointing a receiver was made by our brother Beasely, J. When the matter came on for final disposal before Srinivasa Aiyangar, J., he held that the matters which had to be determined required a considerable quantity of evidence and the determination of various facts and issues some

*O. S. A. No. 124 of 1926. 2nd August, 1927.

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of which were really complicated. He was also of opinion that the petitioner has got another remedy for the removal of the executor by way of a regular suit and that the object of this section was merely to provide a summary remedy for such removal in addition to that by suit. No evidence was taken by the learned Judge in respect of the allegations made by the petitioner. On the view he has taken he dismissed the petition. He also expressed a suspicion that the petition was not made in good faith but was actuated by some other motives. Now S. 301 of the Succession Act, re-enacts S. 4 of the Administrator General's Act V of 1902. That Act itself reproduces the provisions of the Judicial Trustees' Act of of England, 59 and 60 Vict. Ch. 35. Until the Judicial Trustees' Act of 1896 was passed in England and the Administrator General's Act V of 1902 was passed in India, the Courts had already no power to remove an executor. If the character of executor has ceased and he becomes merely a trustee he might be removed from his position as a trustee but if he continued to be executor he could not be removed from his position as executor. This is the view of Kekewich, J., in *Ratcliff, In re.* (6). At page 356, he says:

"That is to say, the Court can under this Act, do what it could not do before—remove an executor".

The same view was taken in India by Tyabji. J., in *Amerchand Madhowji, Exparte* (7). He quotes Lewin on Trusts which says:

"An executor is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged, even by the Court from his executor-ship. When the funeral and testamentary expenses, debts, and legacies have been satisfied, and the surplus has been invested upon the trusts of the will, the executor then drops that character and becomes a trustee in the proper sense, and may then be discharged from the office like any other trustee."

Mr. Duraisami Aiyar appearing for the respondent argues that even prior to the Judicial Trustees Act of 1896 there was certainly some jurisdiction in the Court of Chancery by which the estate can be protected. He concedes that an executor cannot be removed but in the case of a bankrupt-executor or in case of waste or improper disposition of the property by the executor the Court of Chancery can appoint a receiver. But the Court will not interfere merely because an executor is poor. See Williams on Executors, 10th Edition, page 1615 and Ingpen on Executors, 2nd Edition, page 51. But this seems to be

6. (1898) L R 2 Ch. 352. 7. (1905) I L R 29 B 188 at p. 190.

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a remedy for a very limited kind and it is of a very indirect character when the Court restrains an executor from acting merely by the appointment of a receiver. Now, much wider powers are conferred upon Courts both in India and in England for the removal of an executor. Mr. Doraisami Aiyar does not contend that a regular suit for the removal of an executor lies apart from S. 301. It is therefore clear that if the removal of an executor is sought and not an indirect restraint on him by merely getting the appointment of a receiver, the only remedy that is open is under S. 301. The use of the word 'may' in this section shows merely that a proper case must be made out and the Court shall act only if a proper case is made out. To that extent, no doubt, the power vested in a Court under this section is discretionary, but the discretion is not arbitrary but it is judicial discretion. It may be that the section does not try to exhaust the kinds of charges that may be brought against an executor or other circumstances that ought to be made out before his removal can be obtained. The fact that Beasley, J., thought that a receiver ought to be appointed shows that in his opinion there was good reason for the appointment of a receiver. The learned Judge (Srinivasa Aiyangar, J.) does not say that the allegations made by the petitioner in this case do not make out a *prima facie* case, even if proved. That being so, we think the Court ought to enquire into the allegations made by the petitioner; and if the facts proved do not make out a proper case it is another matter. But it may not be open for a Court to dismiss the petition without any kind of enquiry into the allegations made. As to the apprehension that the Original Side may be flooded by applications of this kind, all that we can at present say is we do not know how far the apprehension is justified. In many cases the allegations themselves may be *prima facie* frivolous and in such cases petitions may fail without even an enquiry. But assuming that there may be a large number of such applications, that is no ground for refusing an obvious remedy now conferred upon the parties by the Legislature. I do not think it is necessary to pursue this kind of argument any further. The result is, the order of the learned Judge will be set aside and the case will go back to the Original Side for enquiry into the petition.

We are informed that the receiver appointed by Beasley, J., has been discharged as a result of the dismissal of the petition. Now that the order dismissing the petition is set aside,

we think it is safe in the interest of the estate and in the interests of all parties that the receiver should continue. We do not mean to express any opinion as to the allegations and counter-allegations made by the parties against each other at this stage. Seeing that there has been a receiver up to the dismissal of the petition and his discharge was really a result of the dismissal of the petition, we think it is proper that he should continue now that the order dismissing the petition is set aside.

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The receiver will act under the directions of the Court.

Costs up to this stage will abide the result.

Stamp paid on appeal will be refunded.

N. S. *Appeal allowed and case sent back for enquiry.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[In the ordinary original Civil Jurisdiction.]

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

M. Duraisami Aiyangar & Brothers ... *Plaintiffs**

v.

P. Varadarajulu Naidu and 3 others ... *Defendants.*

Duraisami Aiyangar v. Varadarajulu Naidu.

Mortgage—Suit on—Title of person claiming adverse to the mortgagor and the mortgagee—If can be adjudicated—Civil Procedure Code, O. 34, R. 1—Scope and object of—Person already on record in a mortgage suit as necessary party—Issues raised in deciding which Court may have to go into the question of ownership—Question of ownership if should be decided in the suit itself—Plaint if can be allowed to be amended so as to raise the question of ownership—C P C., O. VI, R. 17.

To a mortgage suit a person claiming an adverse or paramount title is not ordinarily a necessary or proper party; this rule is not absolute or inflexible, for, in certain circumstances, it may not only be proper but even desirable to implead him as a party.

Case-law reviewed.

The object of O. 34, R. 1 of the Civil Procedure Code, is to define the scope of a mortgage suit as such, that is, of a mortgage suit pure and simple, but this rule is not directed to the question whether any cause of action may or may not be joined to a claim on a mortgage, and if may be joined, in what circumstances.

Where a person is already on the record as a necessary party in a mortgage suit, and there are issues raised in deciding which the Court will be obliged to treat the fact of that person being or not being the owner as an important element rendering the case of either party to the suit, viz., the mortgagee or the mortgagor, probable or improbable, the

*C. S. No. 30 of 1927—Application to amend the plaint. 10th Oct. 1927.

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quustion of owner-ship as one of fact is bound up with the other questions that necessarily arise in the case and should be tried and decided in the suit itself. In such a case, the plaint should be allowed to be amended so as to raise the question of owner-ship, if it did not raise it originally.

S. Duraiswami Aiyar and *V. C. Gopalarathnam* for plaintiff.

D. Adinarayana for Defendant No. 3.

N. Babu Rao for Defendant No. 1.

K. Krishnaswami Aiyangar with V. Venugopala Mudaliar for Defendant No. 4.

The Court delivered the following

JUDGMENT :—This is an application made by the plaintiff for permission to amend his plaint. The amendment proposed affects the 3rd defendant who opposes the application. The question I have to decide is, can the proposed amendment be allowed?

I shall refer to such allegations in the plaint as are relevant to the present purpose. The suit is brought to enforce an equitable mortgage created by the 1st defendant by his depositing certain title-deeds. There were dealings between the plaintiffs' firm and the 1st defendant's firm and in the course of those dealings the latter executed promissory notes in favour of the former. About the month of December, 1925, there was a sum of a little over Rs. 12,000 due to the plaintiffs and it is alleged that the 1st defendant then deposited with them title-deeds of properties mentioned in Schs. B, C and D to the plaint with a view to create an equitable mortgage over them. Although the deeds were deposited by the 1st defendant it is alleged that he represented that he was making the deposit both on his own behalf and on behalf of the 3rd defendant who was described as his adoptive mother. The properties mentioned in Sch. B stood in the name of the 3rd defendant and the plaint alleges that the 1st defendant represented at the time that he was duly authorised by the 3rd defendant to deposit the title-deeds of those properties. There is a further allegation in the plaint that the 3rd defendant is bound in respect of the last mentioned properties for the additional reason that she allowed the 1st defendant to be in possession of the title-deeds relating to them and is therefore estopped from disputing the plaintiffs' right thereto.

The first point to note is, that the plaintiffs seek to enforce the mortgage both against the 1st and the 3rd defendants. Although in this respect the plaint is lacking in clearness, there can be no reasonable doubt, on a reading of the whole plaint,

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that this is what is intended. In paragraph 9 it is stated that the 1st defendant agreed that when called upon, he and the 3rd defendant would execute a deed of mortgage in due form and get it registered. It is then alleged that the plaintiffs got prepared a draft deed of mortgage but that neither did the 1st defendant nor the 3rd execute it in spite of demands. Then again the first prayer in the plaint is that a mortgage decree may be passed against both the 1st and the 3rd defendants. The suit must be therefore regarded as one to enforce a mortgage against both the 1st and the 3rd defendants alike.

The 3rd defendant has filed a written statement denying

(*a*) that the 1st defendant is her adopted son;

(*b*) that she authorised the mortgage;

(*c*) that she empowered the 1st defendant to make the deposit of the title-deeds of the properties in Sch. B; or

(*d*) that she is estopped by her conduct from questioning the plaintiffs' right to the last mentioned properties.

On these pleadings issues were raised on the 19th of July and the Judge's summons for the amendment in question was taken out on the 19th of August. The plaintiffs seek to amend the plaint by alleging that, as a matter of fact, the properties in Sch. B belong to the 1st defendant by whom they were acquired *benami* in the name of the 3rd defendant; in other words, the plaintiffs desire to raise the question of ownership in regard to these properties. The 3rd defendant's objection is that her paramount title cannot be litigated in the plaintiffs' mortgage suit and that as the object of the amendment is to obtain a decision on this adverse right, the same ought not to be allowed.

The question I have to decide is therefore one of law; can the title of a person claiming adverse to the mortgagor and the mortgagee, be adjudicated on in a mortgage suit?

In *Bhuban Mohan* v. *Co-operative Hindusthan Bank, Ltd.* (1), which was a suit on a mortgage, those that were impleaded as defendants were the mortgagors as well as a lady by name Susila, the wife of one of them. She was made a defendant on the ground that she was the *benamidar* in respect of the premises mortgaged, the true owner being her husband. The point was raised whether she was a proper party and whether her adverse claim could be investigated in the mortgage suit. The Court held that she was not only a proper party, but, in the circumstances, it was desirable that there should be an

1. (1925) 29 C W N 784.

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adjudication in regard to her title in the suit itself. *Sanderson, C. J.*, expresses the opinion that the question is one of misjoinder and inconvenience and not one of jurisdiction and that at the most the joinder is an irregularity. Rankin, J., who discusses the point at some length points out that mortgage suits with reference to multifariousness do not stand on a footing different from other classes of suits and holds that there is nothing to prevent a question of this kind being litigated in the mortgage action itself. The learned Judge traces the history of the English and Indian procedure and shows that the course objected to is not opposed to the present law on the point as contained in O. 1, R. 3 of the Civil Procedure Code.

The same question in a somewhat different form arose in *Zakir Rasa* v. *Madhusudhan* (2). The property was mortgaged *inter alia* by the mother of the 2nd defendant. She died before the suit and the 2nd defendant was impleaded as a party as being one of her heirs who inherited the property. He pleaded that he was entitled to the mortgage-property by reason of a deed of gift executed in his favour by his mother long prior to the mortgage deed. An issue was raised in regard to his title based upon the gift and the trial Court decided the same against the 2nd defendant and in the appeal to the High Court it was urged at a late stage that it was improper to raise an issue as regards title in such a suit and that an ordinary mortgage decree should have been passed without determining the question of ownership. This contention was overruled. Sir Dawson Miller, C. J., observes that to grant a decree without deciding the matter raised would be to encourage fresh litigation. Jwalaprasad, J., points out that although the general principle is that questions relating to titles paramount should, as far as possible, be excluded from the trial of a mortgage suit, this was not an absolute or inflexible rule to be applied without regard to circumstances. The learned Judge adds

"where the leaving of such an issue un-determined would lead to inconvenience or hardship, it is proper that it should be tried in a mortgage suit."

In *Ramalakshmanna, In re.* (3), Sadasiva Aiyar, J., holds that there is no prohibition in the Code against impleading as a defendant in a mortgage suit a party who sets up a paramount or adverse title.

2. (1918) 45 I C 691. 3. (1914) M W N 623.

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Jageshwar Dutt v. *Bhuban Mohan Mitra* (4) is generally treated as the leading case on the point. The main judgment is that of Mukherjee, J., who himself points out in a later case that the rule against joinder which he adopted in the earlier one is not inflexible See *Gokul Chandra Roy* v. *Rameshwari Choudhrani* (5).

The observation of the Judicial Committee in *Radha Kunwar* v. *Reoti Singh* (6) does not militate against the view that has been taken in the decisions I have cited. In that case a person who set up an adverse claim was made a party to a mortgage suit and in the course of the judgment there is an *obiter dictum* that such joinder is irregular and tends to confusion. Generally, it is undoubtedly so; but the question remains, are there circumstances in which such a joinder is proper or even desirable?

I may also refer to *Ramanna* v. *Venkatanarayana* (7), where Devadoss, J., while dealing with a question of *res judicata* notices some of the rulings on the point.

What is the result of the authorities? To a mortgage suit a person claiming an adverse or paramount title is not ordinarily a necessary or proper party; this rule is not absolute or inflexible, for, in certain circumstances, it may not only be proper but even desirable to implead him as a party. Is O. 34, R. 1, Civil Procedure Code, inconsistent with this conclusion? It says:

"Subject to the provision of this Code all persons having an interest either in the mortgage-security or in the right of redemption shall be joined as parties to any suit relating to the mortgage"

As Rankin, J., points out in *Bhuban Mohan Ghose* v. *Co-operative Hindusthan Bank, Ltd.*, (1), to which I have already referred, the object of this rule is to define the scope of a mortgage suit as such, that is of a mortgage suit pure and simple but this rule is not directed to the question whether any cause of action may or may not be joined to a claim on a mortgage, and, if it may be joined, in what circumstances.

Let me now examine the facts of this case to ascertain whether it will be convenient or desirable to raise an issue regarding the title of the 3rd defendant. Both the 1st and the

1. (1925) 29 C W N 784.
4. (1906) I L R 33 C 425. 5. (1911) 11 I C 826.
6. (1916) L R 43 I A 187: I L R 38 A 488: 31 M L J 571 (P C).
7. (1926) 51 M L J 52,

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3rd defendants distinctly allege that the property belongs not to the former but to the latter. The form in which the question generally arises is, is the party setting up an adverse or paramount title a necessary or proper party? It is important to note that in the present case the question does not arise in that form. The 3rd defendant has been made a party on grounds which are independent of, adverse or paramount, title. The form in which this question therefore arises is, whether, she being already on the record as a necessary party, the issue relating to title should be permitted to be raised or not. There is an issue raised in the case, namely: did the 3rd defendant authorise the mortgage? There is a further issue to the effect, was her conduct such as to have misled the plaintiff into believing that the 1st defendant was the owner? In deciding these questions as questions of fact, the Court, while weighing the evidence, will, in all probability, be obliged to treat the fact of the 3rd defendant being or not being the owner, as an important element, rendering the case of either party either probable or improbable. Why should then this question be left over to be decided in another suit? The mere opinion of the Court as such will not be binding upon the 3rd defendant, but if the issue is raised and tried the Court's decision will be binding. It is certainly not desirable that the Court should express an opinion in this case which may happen to be opposed to its decision in the next. The question of ownership as a question of fact is bound up with the other questions that necessarily arise in the case and it seems to me that this is a strong reason for holding that the issue should be tried and decided in this action itself.

Moreover, the 3rd defendant is already before the Court in another character. Supposing the Court holds that she authorised the mortgage, or, by reason of the rule of estoppel, she is bound by the mortgage and passes a mortgage decree against her, of what practical use is this decree to the plaintiff if it turns out that she is not the owner? Supposing again the Court holds that the 3rd defendant is not bound by the mortgage on the grounds taken and the question of her title is left open, is not the result very unsatisfactory seeing that at the sale a proper price will not be obtained and the purchaser himself may get no title? There is another important consideration; whether the 3rd defendant having been rightly made a party she is bound to assert her title in this case at the

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risk of the question becoming *res judicata*, is a matter of some doubt. See *Ramanna* v. *Venkatanarayana* (7) already referred to and the Letters Patent Appeal therefrom, No. 4 of 1927.

Having regard to these various circumstances, I am clearly of opinion that the issue must be raised and tried in this case. As the point was not originally taken in the plaint, I direct, while allowing the amendment, that the applicant shall pay the 3rd defendant her costs which I fix at Rs. 150. The 3rd defendant's vakil says that he intends to raise a point of jurisdiction if the amendment is allowed. He will have liberty to file a fresh written statement and he may take this point. Plaint shall be amended within one week, the 1st, the 3rd and the 4th defendants shall file their further written statements within 2 weeks, and the case shall be posted for further issues one week thereafter.

N. S. *Application granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Anthoni Udaiyan ... *Petitioner** (*Accused*).

v.

Royappudayar ... *Respondent* (*Complainant*).

Anthoni Udaiyan v. Royappudayar.

Cattle Trespass Act, S. 24—Penal Code, S 323—Offences under—Separate sentences for—Legality of

The force necessary to constitute the offence of rescuing cattle may fall short of "causing bodily pain", and if further force is used which does cause bodily pain, the offences which involve and are complete by mere use of criminal force have been exceeded and that excess constitutes another offence, viz., that of causing hurt, or causing whatever more serious form of bodily hurt has been the result. In such a case separate sentences for the offences of causing hurt and of rescuing cattle may legally be passed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional First-Class Magistrate of Ariyalur in Criminal Appeal No. 50 of 1926 (C. C. No. 21 of 1926) on the file of the 2nd class Magistrate of Udayarpalayam).

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*Cl. Rev. Case No. 78 of 1927. 29th April, 1927

(Cl. Rev. Petn. No. 70 of 1927).

Anthoni Udaiyan v. Royappadayan.

V. L. Ethiraj and *A. S. Sivakaminathan* for petitioners.

A. Srirangachari for respondents.

Public Prosecutor for the Crown.

The Court made the following

ORDER :—It is first argued that the infliction of separate sentences for offences under S. 24 of the Cattle Trespass Act, and S. 323 of the Indian Penal Code, is illegal, on the ground that the force used to rescue is neither more nor less than, but the same as, the force which caused hurt. I am aware that certain learned Judges of this Court sitting singly have upheld a similar contention with reference to separate sentences for offences of rioting and causing hurt, when the force used which constitutes an ingredient of the rioting was also the force which caused the hurt. (See Criminal Revision Case No. 248 of 1924 and Criminal Revision Case No. 982 of 1926). But I am not able to accept that view. Causing hurt and using force are not the same thing and the word 'force' does not appear in the definition of 'hurt'. The use of criminal force is no doubt an ingredient of the offence of rioting and the use of force may be an ingredient in the offence of rescuing cattle, but the force necessary to constitute these offences may fall far short of "causing bodily pain" and if further force is used which does cause bodily pain, then in my view, the offences which involve and are complete by mere use of criminal force have been exceeded and that excess constitutes another offence, viz., that of causing hurt, or, causing whatever more serious form of bodily hurt has been the result. The offence of causing hurt is therefore in the present case to my mind a separate offence from that of rescuing cattle, and separate sentences may legally be passed.

A point is raised that there has been no finding that damage was caused by the trespass of the cattle. I think both Courts have accepted P. W. 1's statement that his paddy crops were grazed. If this point had been clearly taken in the Lower Courts, the finding would have been clearer. I am not prepared to interfere and I dismiss this petition.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS.

Makam Chandrayudu ... *Petitioner** (*1st Respt.*).

v.

Madasu Pedda Rangappa ... *Respondent* (*Petr.*).

Election—Municipal Election Rules—Illiterate voter—Ballot paper of —Marking of, by polling officer in presence of candidate or his agent—Validity—R 15 of the Rules—Effect

Chandrayudu *v.* Rangappa.

There is no provision in the Municipal Election Rules insisting on the absence of the candidates or their agents from the place where the ballot paper of an illiterate voter is marked by the polling officer, and, therefore, the marking of the paper in the presence of the candidate or his agent cannot be said to be a violation of any of the rules.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order dated, the 18th December, 1926, of the District Court of Anantapur in O. P. No. 44 of 1926.

Mr. P. Siva Rao and *Mr. K. Srinivasa Rao* for petitioner.

Mr. B. Somayya for respondent.

The Court delivered the following

JUDGMENT:—The question that arises for decision is whether under R. 15 of the Municipal Election Rules an illiterate's voting paper must be marked by the polling officer in secret and not in the presence of the candidates or their agents. In the rules for election to the Local Boards there is a specific provision in the rule corresponding to R. 15 that this paper shall be marked in the presence of the candidates or their agents. There is also a similar provision in the English Electoral Rules. In the Municipal Rules as in the rules for election to the legislative Council, etc., there is no such provision and R. 15 reads as follows:—

"If the voter is unable to read the ballot paper or to make a cross thereon, and applies for assistance in doing so, that Polling Officer shall read it for him and, if so required, mark the ballot paper according to the directions of the voter and give it to him to put in the ballot box.

It is contended for the petitioner that there is no direction that the polling officer shall go either to the place set apart for illiterate voters to record their votes or to some other place where the candidates and their agents are not and that therefore there is no rule prohibiting the marking of the vote in the presence of the candidates. No reason has been put forward for the difference in the two sets of rules for the Local Boards and

*C. R. P. No. 427 of 1927. 5th May 1927.

Chandrayudu v. Rangappa.

the Municipal Councils, respectively, and therefore the matter resolves itself into a question of the interpretation of R. 15. There is no provision in the Rule for the polling officer going apart or for the withdrawal of the candidates and their agents. No doubt secrecy as far as possible is the object of the rules and it might be considered that some such action as above should be adopted by the polling officer but it must be remembered that in the case of illeterate voters there cannot be absolute secrecy as the polling officer must know for which candidate the vote is to be recorded. It is also to be noted that Cl. 3 of R. 15 says that the marking of a ballot paper by the polling officer shall not be questioned "subsequently" on the ground that it was not in accordance with the voter's dirertions. The word "subsequentlly" may possibly imply that at the time of marking it can be questioned, but that is only a possible inference. I am however satisfied that there is no provision in the rules insisting on the absence of the candidates or their agents from the place where the ballot paper is marked by the polling officer and therefore, the marking in the presence cannot be said to be a violation of any of the rules. I must therefore allow this petition and as it is said that there are other objections which have not been disposed of by the learned District Judge the petition will have to be referred back to him for disposal on the other points.

I may observe that the District Judge after finding that paper had not been marked in the proper manner omitted to record a finding on the question of whether the non-compliance with the rules had affected the result of the election as requiured in R. 11, Cl. c of the rules for decision of disputes.

The respondent will pay the petitioner's costs.

A. S. V. *Petition allowed with costs.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

Kunnammal Mayan and others ... *Petitioners** (*Accused Nos* 2, 4 *to* 6, 8, 10 *and* 11.)

Kunnammal Mayan, *In re.*

Indian Penal Code, Ss 71, 147 *and* 323—*Rioting and voluntarily causing simple hurt—Separate sentences—Necessity of*

Separate sentences must not be imposed for the offence of rioting and voluntarily causing simple hurt under Ss 147 and 323 of the Indian Penal Code.

Bishna v. *Emperor,* (1922) 73 I. C. 517 followed.

*Crl. Revn. C. No. 964 of 1926. 21st April 1927.
(Crl. Revn. Petn. No. 835 of 1926).

Konnammal Mayan, *In re.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session of the South Malabar Division in Criminal Appeal No. 57 of 1926 preferred against the order of the Court of the Sub-divisional Magistrate of Calicut in C. C. No. 43 of 1926.

V. L. Ethiraj and *C. Sridaran* for petitioners.

The Public Prosecutor for the Crown.

The Court made the following

ORDER :—The seven petitioners have been convicted of rioting and voluntarily causing simple hurt under Ss. 147 and 323, Indian Penal Code, and these convictions have been upheld on appeal. The learned vakil who argues this Criminal Revision Petition endeavours to make three points against the convictions. It is said in the first place that the common object has not been clearly found by the Appellate Court to be established, but I do not think that the view expressed in paragraph 36 of its judgment, that the riot is unlikely to have been organised from Mokkam, has that meaning. On the other hand it is clearly made out that the appellants all joined together to beat the estate writers and from their community of action a common intention could be inferred.

The next point is that separate sentences should not have been imposed for the offence of rioting and causing hurt. Two cases have been cited to me as authority for this proposition. One is an unreported case, Criminal Revision Petition No. 209 of 1924, decided by Krishnan, J. and the other a decision of Mr. Justice Campbell of the Lahore High Court in *Bishna* v. *Emperor* (1). The reasoning in both these judgments is similar, namely, that, where the causing of the hurt is itself the particular form of the force or violence which contributed to the offence of rioting, the one offence was included as an ingredient in the other. I have felt a good deal of hesitation in accepting this view, because, if it is logically extended, it would seemingly prevent also separate convictions for rioting and grievous hurt and even for rioting and murder, where the grievous hurt and the murder respectively constituted the only force or violence upon which the charge of rioting was based. Not, however, endeavouring to decide these extreme cases but restricting myself to the present circumstances, I find it very difficult to escape the conclusion that to convict for voluntarily

1. (1922) 73 I C 517.

Kunnammal Mayan, *In re.*

causing hurt where the only violence which formed the act of rioting was the hurt itself offends against the provisions of S.71 of the Indian Penal Code; and it would only be by some such fine-drawn distinction as the learned Public Prosecutor endeavours to draw, on the one hand viewing the act which causes the hurt as one of violence pure and simple without regard to its consequences, which might be enough to satisfy the definition of rioting, and on the other as one the consequences of which were to cause bodily pain, disease or infirmity, which would be necessary in order to satisfy the definition of hurt, that this conclusion could be avoided. I do not feel sufficient confidence in the validity of this distinction to justify me in differing from the view taken in the two judgments above referred to. Accordingly I must set aside the convictions for hurt and sentences of one month's rigorous imprisonment awarded in respect of them.

The third and last point taken is that the 3rd petitioner is a boy of 15 and that he should be specially dealt with. The learned Public Prosecutor fully agrees that the sentence which he has already undergone, amounting to some 20 days, is sufficient and that the remainder should be remitted. He will accordingly be released.

N. S. *Conviction set aside.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT :—LORD SINHA, LORD BLANESBURGH, LORD SALVESEN AND SIR JOHN WALLIS.

Deonarain Pande ... *Appellant**

v.

Agyan Ram Pande, since deceased, and others ... *Respondents.*

P. C.

Deonarain Pande *v.* Agyan Ram Pande.

Hindu Law—Joint family—Partition—Proof of—Onus—Quantum—Nephew—Claim by, to properties of uncle by survivorship as against his widows—Plea of separation by widows—Partition between branches—Partition among members of other branch inter se*—Presumption—Evidence of partition—Small transactions of his own by each of members—Effect.*

S and *R* were two brothers. After their deaths, there was a partition between *S's* branch, represented by his son, *G*, and *R's* branch, represented by his sons *T* and *A*. It was not clear whether there was at the same time a separation *in fact* between *T* and *A inter se.*

Quaere : Whether, when *G* separated, the whole coparcenary was dissolved as a matter of law, and *T* and *A* became necessarily separated,

*P. C. Appeals Nos. 10, 11 and 12 of 1922. 10th December, 1926.

P. C.

Deonarain Pande v. Agyan Ram Pande.

though *T* or *A* would from that time continue joint with his own son and grandson.

Hari Bakhsh v. *Babu Lal,* (1924) L R 51 I A 163 : 47 M L J 938 (P C) referred to.

The mere fact that either of the members of a Hindu family had small transactions of their own does not prove that they were necessarily separate.

In a suit by a nephew against the widows of his deceased childless uncle claiming to be entitled by survivorship to the properties which stood registered in the deceased's name, jointly or otherwise, the widows claimed that they had succeeded to that interest, as their husband was separate from the plaintiff when he died. The uncle died in 1911, and the separation alleged by the widows was in 1897-98.

Held, reversing the High Court, that the widows did not discharge the onus which rested upon them of proving that there was a separation between the plaintiff and the deceased in 1897-98 or at any time prior to the death of the latter in 1911.

Consolidated Appeals (Nos. 10, 11 and 12 of 1922) from the decrees of the High Court at Allahabad, dated the 29th July, 1918, which reversed the decrees, dated the 30th March, 1915, of the Court of the Subordinate Judge of Basti.

De Gruyther, K. C. and *A. Majid* for appellant.

The respondents were not represented.

10th December, 1926. The Judgment of their Lordships was delivered by

Lord Sinha.

LORD SINHA.—The principal question in these appeals is whether or not Deonarain Pande and Thakur Persad Pande were at the time of the latter's death, members of a joint Mitakshara family.

The family pedigree, about which there is no dispute, is shown below.

Lachmi Narain
- Salik Ram
  - Ganga Persad
    - Udai Sankar.
- Ram Nidh
  - Tulsi Ram
    - Thakur Persad, Mst. Ram Piari, Mst. Lal Dei.
    - Sital Persad, deceased
      - Deonarain.
  - Agyan Ram
    - Ajudhya Persad, deceased, Mst. Sartaj Koer.
    - Kanhaiya Persad, deceased.

Thakur Persad died on the 3rd February, 1911, leaving 2 widows, Ram Piari and Lal Dei, but no children. Thereupon, there was what has been called the inevitable preliminary contest

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for mutation of names in the Revenue Courts. Deonarain claimed that his name should be registered in lieu of Thakur Persad's in respect of all properties which stood registered in his name, jointly or otherwise, on the ground that Thakur Persad's interest had passed to him by right of survivorship. The widows claimed that they had succeeded to that interest, as Thakur Persad was separate from Deonarain when he died. Agyan Ram did not put forward any claim of his own in these mutation proceedings.

The Revenue Courts decided in favour of the widows and against Deonarain. Thereafter on the 13th January, 1914, Deonarain instituted 2 suits in the Court of the Subordinate Judge of Basti—Nos. 13 and 14 of 1914.

Suit No. 13 of 1914 was brought against Agyan Ram and the 2 widows of Thakur Persad in respect of an elephant which was claimed as belonging to the joint estate of Thakur Persad, deceased, and the plaintiff Deonarain.

Suit No. 14 of 1914 was brought against the widows Msts. Ram Piari and Lal Dei for the recovery of the properties in dispute as forming the said joint estate.

Agyan Ram also brought a suit against the widows and Deonarain (No. 97 of 1914) claiming that he and not Deonarain was joint with Thakur Persad when the latter died.

All the 3 suits aforesaid (No. 13, No. 14 and No. 97 of 1914) were tried together, and the two principal issues raised were—

1. Whether Thakur Persad when he died was joint with Deonarain or Agyan Ram or neither? and

2. Did Agyan Ram take possession of any elephant belonging to Thakur Persad and Deonarain (jointly)? If so, what was its value?

After recording evidence, both oral and documentary, on behalf of all 3 parties, the Subordinate Judge, in an exhaustive and careful judgment, held that when Thakur Persad died he was joint with Deonarain but separate from Agyan Ram. He also held that Agyan Ram had taken an elephant, belonging to the joint estate of Thakur Persad and Deonarain and of the value of Rs. 2,000. He accordingly made a decree in favour of Deonarain in each of his suits (Nos. 13 and 14) and dismissed Agyan Ram's suit (No. 97).

The widows and Agyan Ram filed separate appeals to the High Court against the two former decrees and Agyan Ram also appealed against the decree in Suit No. 97.

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The High Court heard all these appeals together and held that neither Deonarain nor Agyan Ram was joint with Thakur Persad when the latter died and accordingly decreed the widows' appeal and dismissed Agyan Ram's appeal in Suit No. 14. They decreed Agyan Ram's appeal in the elephant case on the ground that as Deonarain had no present interest in Thakur Persad's estate, he had none in the elephant, even if it did belong to that estate and not, as Agyan Ram claimed, to his daughter-in-law's estate of Luggupur.

Deonarain has appealed to His Majesty in Council against both the High Court decrees against him, viz., the one in favour of the widows, and the other in favour of Agyan Ram. The respondents in these appeals which have been heard together have not appeared and they have consequently been heard *ex parte*. Their Lordships have considered the whole of the evidence, which has been fully and fairly placed before them by the appellant's counsel.

As is not uncommon in cases of this class in India, the bulk of the very considerable body of oral evidence in these cases on behalf of all the 3 parties was considered unsatisfactory and unreliable by both the Subordinate Judge and the High Court, and their Lordships agree in that opinion. Unfortunately, a good deal of the documentary evidence also is more or less inconclusive. Both Courts therefore found considerable difficulty in coming to a conclusion upon the evidence on what appears at first sight to be a simple question of fact.

In these circumstances, their Lordships would first consider what are the facts which were undisputed or have been concurrently found by both the Courts, and they appear to be as follows:—

At one time, the two branches of the family of Lachminarain Pande were joint, with their ancestral home at village Datua Khor, where they had 2 houses, one large and one small. They owned a number of villages, including one called Gumanari, in which they had a sort of hut called a *Khalunga* (collection or cutcheri-house). Some time prior to March, 1889, there was a separation between the two branches, *i.e.*, between Salikram's branch, represented by Ganga Persad, and Ram Nidh's branch, represented by Tulsi Ram and Agyan Ram. It is not clear whether there was at the same time a separation *in fact* between Tulsi Ram and Agyan Ram *inter se*. It is argued that when Ganga Persad separated, the whole coparcenary was dissolved as a matter of law, and Tulsi Ram and Agyan Ram

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became necessarily separated, though Tulsi Ram from that time would continue joint with his own son and grandson (Thakur Persad and Deonarain) who from then onwards constituted a new joint family. The case of *Hari Bakhsh* v. *Babu Lal* (1) is relied upon as authority for this proposition.

However that may be, it has been concurrently found by both the Courts that some time between 1889 and 1892 Agyan Ram did actually separate from his brother Tulsi Ram and his branch. Thereafter he never had any transaction jointly with Thakur Persad or his branch, and was separately recorded in the Revenue Register and the village papers, with regard to the villages jointly owned. Their Lordships have no hesitation in accepting this concurrent finding that Agyan Ram became separate from his brother Tulsi Ram's family before 1892.

The next undisputed fact in the history of the family is that about the year 1889 Tulsi Ram and his branch of the family left the ancestral home at Datua Khor and migrated to Gumanari where they converted the little *Khalunga* into their family residence. Agyan Ram continued to live with his family in the old home at Datua Khor. Tulsi Ram died shortly after 1889 and thereafter Thakur Persad and his minor nephew Deonarain continued to live at Gumanari, until Thakur Persad built a new house at village Mohna Khor, some time between 1901 and 1904, to which he removed with his two wives, leaving Deonarain to live in the Gumanari house with his family. Both Courts have found and their Lordships agree that neither Deonarain nor Agyan Ram ever lived in this house at Mohna Khor.

The reason why Thakur Persad removed to Mohna Khor has been variously stated in the evidence. It is not necessary to go into that matter, as it is not the case of any of the parties to this litigation, and there is no evidence even to suggest that a partition took place between Thakur Persad and Deonarain at the time when the former removed his residence from Gumanari to Mohna Khor.

Deonarain was a child when Tulsi Ram's family removed to Gumanari about 1889 and after Tulsi Ram's death he remained joint with his uncle Thakur Persad; and the sworn testimony of Thakur Persad himself, in Suit No. 781 of 1896, recorded on the 13th of January, 1897, proves incontestably that on that date he and Deonarain were still joint. The onus of proving

1. (1924) L R 51 I A 163 : 47 M L J 938 (P C).

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a separation between them subsequent to that date is of course on the party alleging such separation.

The case made on behalf of Thakur Persad's widows—and in this respect Agyan Ram supported them—was that such separation took place in fact some time towards the end of 1897 or early in 1898, shortly after Deonarain attained his majority. Considerable oral evidence was adduced to prove that at this time Deonarain was pressing for a partition which was effected and by which Deonarain gave up his share in the different villages over which the family estate was scattered and took in lieu thereof the whole of the 12 annas share or *patti* in village Gumanari which previously belonged jointly to himself, Thakur Persad and Agyan Ram.

The Subordinate Judge rejected the case so made. It was, he considered, invented after the mutation proceedings, as no such case was at that time made by the widows or by Agyan Ram who was then supporting them.

The High Court, on the other hand, accepted this case. Mr. Justice Walsh considered that though the evidence of express partition could not be accepted, Deonarain's own course of conduct, in residence, business and life and his insincere efforts to explain them away show conclusively that he had separated from Thakur Persad. Mr. Justice Piggott in a careful judgment reviewed the whole evidence and while agreeing with the Subordinate Judge that much of it was unreliable also came to the conclusion that the circumstances of the case generally and the documentary evidence afforded a great deal of corroboration to those witnesses who deposed to a definite separation between Deonarain and Thakur Persad shortly after the former had attained his majority.

Taking first the direct evidence, it appears that Mr. Justice Piggott was inclined to accept the evidence, in part at least, of 2 of the witnesses who deposed to an actual and formal separation in 1897 or 1898, viz., Shivraj Ram Sukul, the family priest, examined on behalf of Agyan Ram, and Tribeni Lal, the village Patwari (a witness for the widows). Apart from the discrepancies in their evidence, to which the learned Judge himself alludes and the unfavourable comments thereon by the Subordinate Judge, it appears to their Lordships that this evidence cannot be accepted for the following substantial reasons. Firstly, because the partition they speak to as having taken place in 1897-1898 is one between the *three* co-sharers, viz., Thakur Persad,

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Deonarain, and Agyan Ram, and not merely between the two former. Having regard to the finding that Agyan Ram had separated before 1892, it is impossible to accept the story which assumes that he remained joint till 1898. But the matter does not rest there. If the story was true, Agyan Ram in 1898 gave up his share in village Gumanari to Deonarain. But the Revenue Registers show that Agyan Ram continued to be recorded as proprietor of a 3 annas 10 pies 8 chataks share not only in 1911, when Thakur Persad died, but even after the widows got their names registered. What is of even greater importance is that the Patwari's village papers(Ex. R & Ex.5), filed on behalf of the widows, show beyond doubt that Agyan Ram continued to realise the rents of his share of Gumanari through his agent Chail Behari Lal in 1315 and 1316 Fasli (1908-9). Thus the whole basis of the alleged partition by which Deonarain took the share of Agyan Ram in Gumanari in addition to his own and Thakur Persad's fails entirely. There is the further fact referred to in the judgment of the Subordinate Judge that the alleged partition would have also affected the shares of Thakur Persad and Agyan Ram as between themselves in the other villages in such a manner that thereafter Agyan Ram would collect two-thirds and Thakur Persad one-third of the rents thereof—a fact which is not only not borne out but disproved by the evidence. Nor is it possible altogether to ignore the fact that no such partition was alleged by the widows in the mutation proceedings.

There remains for consideration the circumstantial evidence which was considered by the High Court to support the story of a partition in 1897-98. That resolves itself into (1) separation of residence, and (2) documents after 1898 showing that Thakur Persad and Deonarain were transacting business separately.

As regards residence, it is sufficient to observe that Thakur Persad admittedly did not remove to Mohna Khor till after 1901—possibly 1904. This change of residence is hardly any evidence to prove a partition in 1897-98.

As regards documents, showing transactions by members of the family, quite a number were proved to make out either joint or separate dealings. There are 17 such on the record executed between 1896 and 1911. Of these the most important are 4 conveyances or sale deeds—all of them in favour of Thakur Persad and Deonarain jointly. One of these four, Ex. 3, is a

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conveyance by which Thakur Persad and Deonarain purchased in their joint names a small share in village Datua Khor on the 21st of October, 1908, *i.e.*, more than 10 years after the alleged partition. With regard to this document, it cannot be argued, as it can in support of some of the others, that the consideration was money owed to the family prior to 1898, for in this case the consideration was partly in cash and partly money owing under mortgages of as late as 1906 and 1907.

The rest of the documents, fully summarised by the Subordinate Judge, are either insignificant or inconclusive in their nature; so far as they show joint dealings they discredit the alleged partition, and the mere fact that either of them had small transactions of their own does not prove that they were necessarily separate.

On the whole their Lordships are of opinion that the widows did not discharge the onus which rested upon them of proving that there was a separation between Thakur Persad and Deonarain in 1897-98 or at any time prior to the death of the former in 1911.

There remains the question of the elephant in Suit No. 13 of 1914. The Subordinate Judge held that an elephant belonging to the joint estate was wrongfully taken possession of by Agyan Ram and that the latter's defence to the effect that it belonged to his daughter-in-law Sartaj Kueri, proprietress of the big Luggupur estate, was not made out. Agyan Ram appealed. As the High Court held that Deonarain was separate from Thakur Persad, and therefore took no present interest in his estate or in the elephant, even if it belonged thereto, they decreed the appeal. As their Lordships have arrived at a different conclusion on the main question, it is necessary to consider how far the Subordinate Judge's judgment and decree for Rs. 2,000 in favour of Deonarain is well founded.

Having considered the evidence placed before them, their Lordships see no reason to interfere with that decree.

Their Lordships will accordingly humbly advise His Majesty that the decrees of the High Court appealed from should be set aside with costs and the decrees of the Subordinate Judge restored and that the respondents pay the costs of these appeals.

Solicitors for appellant : *Raymond, Oliver & Co.*

Appeals allowed.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WILLIAM PHILLIPS, *Kt., Officiating Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax, Madras ... *Referring Officer**

v.

Yagappa Nadar ... *Assessee.*

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Commissioner of Income-tax, Madras v. Yagappa Nadar.

Indian Income-tax Act (XI of 1922), S. 2 (1)—Agricultural income—Cocoanut trees situated on lands assessed to Government revenue—Toddy extracted from—If amounts to—Profits derived from the sale of such toddy—If liable to income-tax.

Income derived from toddy extracted from cocoanut trees situated on lands assessed to Government revenue is agricultural income when it is received by the actual cultivator, whether owner or lessee of the land on which the trees grow. If the income is obtained by a person who has not produced the trees from which the toddy is tapped, or has not done any agricultural operation whereby those trees have been raised, it is not agricultural income.

Case stated under S. 2 (1), Act XI of 1922, by the Commissioner of Income-tax, Madras.

1. The Commissioner of Income-tax, Madras, referred for the decision of the Hon'ble the Judges of the High Court the following question:—

"Whether toddy extracted from cocoanut trees situate on lands assessed to Government revenue is or is not agricultural income within the meaning of S. 2 (1) and whether the Income-tax Act applies to profits derived from the sale of such toddy."

2. As the question is a general one it is unnecessary for the purposes of this reference to deal with the facts of this particular case.

3. It is perhaps advisable to give a brief description of the system under which the toddy revenue is administered in the Madras Presidency. The production and sale of toddy without special license is forbidden. Sale is restricted to a certain number of shops, a list of which is published in the local Gazette some three months prior to the commencement of the

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lease year. The right to sell toddy in these shops is then put up to auction and sold for each individual shop to the highest bidder. This right carries with it the right to tap, subject to the payment of the tree tax, a certain number of trees—palmyrah, date or cocoanut—for toddy and to transport that toddy from the tope to the shop. Nobody except the shop licensee may draw fermented toddy from any of these palm trees but a tree may be tapped for unfermented toddy in specially prepared lime-coated pots. After having his bid confirmed by the Land Revenue Officers and his license issued to him, the shopholder has to make his own arrangements to secure trees from which to draw his supply of toddy. Having selected his trees, he pays the owner of the trees certain fees called 'moturpha' and pays tree tax to Government. This tree tax varies from district to district and is about Rs. 4 or 5 for a cocoanut tree and Rs. 3 to 4 for a palmyrah. The trees are then marked by the local Excise Sub-Inspector, license for tapping and license to transport being issued immediately by the Inspector. The toddy is transported to the shops in pots containing about 3 gallons and is sold there by bottles or in small measured mud pots. The profits from the business of toddy selling consist of the difference between the total receipts at the shop and the expenses, viz., the shop kist, tree tax, moturpha paid to the tree owners and such miscellaneous expenses as wages to the shop-sellers, tappers, cost of transport, etc.

4. As the present assessee claims that these profits are agricultural income, he has asked me to refer the above question for your Lordships' opinion. In my opinion the answer to the question must be that income derived from the sale of toddy is not agricultural income and that the Income-tax Act applies to it. The income, *i. e.*, moturpha fees, obtained by the tree owners by leasing out the right to draw toddy is agricultural income because it is derived from the cultivation of trees and no attempt is made to tax it. The income earned by an outside contractor who exploits the trees for the manufacture and sale of toddy on a commercial basis seems to stand on an entirely different footing. Such income is earned by a business venture and can in no sense be regarded as the result of agricultural operations. The ordinary produce of a cocoanut tree is its fruit and the extraction of a special product like toddy is an industrial operation in much the same way as is the manufacture of alcohol from sugarcane or from rice. Further the Excise law does not permit the extraction of toddy by the ordinary

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cultivator. I am therefore of opinion that the income derived from the manufacture and sale of toddy is income derived from "business" as defined by S. 2 (4) of the Income-tax Act and that the exemption granted by S. 4 (3) (*viii*) of the Act does not apply to it.

M. Patanjali Sastri for Referring Officer.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for assessee.

The Court delivered the following

JUDGMENT :—The question referred by the Income-tax Commissioner is—

"Whether toddy extracted from cocoanut trees situate on lands assessed to Government revenue is or is not agricultural income within the meaning of S. 2 (1) and whether the Income-tax Act applies to profits derived from the sale of such toddy."

It is contended for the petitioner that he as lessee of the trees is entitled to treat the income derived from the toddy which is produced from these trees as agricultural income. The juice which by contact with air in time becomes toddy is a product of these cocoanut trees and it is contended that as such it is an agricultural product. That undoubtedly is so, and the income derived therefrom by the person who has produced that product by agricultural operations would be agricultural income, but it does not at all follow that if he sells the juice to another person and that person makes an income by again selling that product, the latter income is agricultural income. Ordinarily, it would certainly not be agricultural income unless it could be shown that the second seller had obtained his income by agriculture, that is to say, he must show that he has either as owner or as lessee done some agricultural operation by reason of which he becomes possessed of the toddy and therefore is entitled to treat the proceeds as income from agriculture. It is contended here that the petitioner is the lessee of the trees, but admittedly not of the land on which they stand. It is very doubtful whether it is possible to have a lease of the trees without the land on which they stand. Under the Transfer of Property Act leases are only in respect of immoveable property and no instance of a lease of moveable property has been suggested to us. No interest in the land has been transferred here and it would appear that what the petitioner has obtained is a mere license to tap

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the trees and draw the juice. If that is so, the mere fact that he has to water the trees (and this is not proved to be the case) shows only that the watering is one of the conditions of his license and not an act whereby the agricultural produce had been raised, for that was raised before he obtained his license. As the facts of the case have not been put before us by the Commissioner, we must give a general answer as follows:—

"Income derived from toddy is agricultural income when it is received by the actual cultivator, whether owner or lessee of the land on which the trees grow. If the income is obtained by a person who has not produced the trees from which the toddy is tapped, or has not done any agricultural operation whereby those trees have been raised, it is not agricultural income within the meaning of the Act."

Counsel's fee Rs. 250 will be paid according to the result of the disposal of the petition.

N. S. *Reference answered generally.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt.*, *Chief Justice*, MR. JUSTICE BEASLEY AND MR. JUSTICE SRINIVASA AIYANGAR.

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In the matter of Mr. S. C. Srinivasachariar.

In the matter of Mr. S. C. Srinivasachariar, Second Grade Pleader, Sholinghur.

Legal Practitioner—Misconduct—Retention of client's money improperly, but not dishonestly—Punishment for—Considerations.

Where, in a case in which a legal practitioner had withheld money of his client, it was found that his conduct in doing so was, though improper, not dishonest, and that he had himself suspended practice during the period during which proceedings under the Legal Practitioners Act in respect of his conduct were pending against him,

Held, that, under the circumstances, a severe censure of his conduct was enough to meet the ends of justice.

Whereas it was brought to the notice of the High Court by the District Judge of Chittoor that S. C. Srinivasachariar, Second Grade Pleader, Sholinghur, in his capacity as the pleader of one Senthamarai Ammal, the plaintiff in S. C. S. No. 592 of 1923 on the file of the Court of the District Munsif of Sholinghur, received from the defendant in the case the sums of Rs. 40 and Rs. 14 on 28th August, 1923 and 27th November, 1923 respectively and in spite of the repeated demands of his client and even after a registered notice addressed to and

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acknowledged by him on 17th December, 1924, he retained with him the said amounts for nearly three years, thereby rendering himself liable to be dealt with under the disciplinary jurisdiction of the High Court for gross professional misconduct and whereas the High Court has issued notice on 7th January, 1927, calling on the said S. C. Srinivasachariar to show cause why he should not be removed from the roll of pleaders of Chittoor District or otherwise dealt with as the High Court may think fit.

K. S. Krishnaswami Aiyangar for Pleader.

The Advocate-General for Government.

The Court delivered the following

JUDGMENT :—The charge against the pleader in this case was that, having received two sums of money amounting in all to Rs. 54 from the defendant in a suit in which he was appearing for the plaintiff, he misappropriated it and converted it to his own use. The money was received at the end of 1923. Many demands were made upon him and he did not pay any attention to them. Ultimately some time in 1926 a complaint was launched under the Legal Practitioners Act against the pleader and he then undoubtedly paid the money and he also put forward an explanation which the District Judge has found to be untrue, namely, that he had been asked by some relations —it is very difficult to make out which of his clients—to keep the money in order that it might be utilised in the purchase of stones for the construction of a temple which I think the client's father was supposed to have been building in Sholinghur. Nobody came forward to speak to the story one way or other. As I say, the learned Judge took the view that it was a mere story invented to stave off the evil day when it came; but it is fair to this man to say that the District Munsif, while not attempting to use it as a justification for what the pleader did, apparently did think that there might have been some vague talk which reached him about the desirability of this money being applied to this purpose and that, no doubt, is why he found, as he did, that the pleader, whom after all he had seen and examined, was not guilty of any fraudulent conduct. Nevertheless he quite rightly held that, even on that showing, he was guilty of improper conduct because he has never at any time pretended that he had instructions to withhold the money for that or any other purpose from his own client who instructed him. It has been brought to our notice by Mr. Krishnaswami Aiyangar who has

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very judiciously said all that can be said for him and assented to by the Advocate-General that for the whole of the year 1926 while these proceedings were hanging over his head he took out no *sannad* and therefore suspended himself as it were from pleading in the Court where his practice lay. The District Munsif says that he had before that been practising in the Court for 15 years and that, so far as he could ascertain, there had been no complaints against him. That appears in the report of the learned District Judge:

"The District Munsif reports that the pleader has been practising in his Court for a period of 15 years and that there has been nothing against him."

None of these matters afford any real excuse for what he did, but we are going to take a lenient view of his case for two reasons not to any very considerable extent because the sum of money was trifling but, first, because he has evinced some sense of propriety by not attempting to take out a *sannad* and seeking to practise while this matter was hanging over his head and he has thus in a way anticipated any sentence of suspension from practice which this Court might otherwise have passed upon him and in the next place, it may be that he had some muddled idea that these people did not really urgently want their money owing to this vague talk about the temple and that may be sufficient warrant for the finding of the District Munsif that, however improper his conduct was, as it undoubtedly was, it was not necessarily dishonest. On that we are quite prepared to give him the benefit of the doubt. He knew perfectly he had no right to withhold the money in spite of demands, whatever the talk about temples or stories of temples or anything of the kind. The sentence of the Court is that the pleader Mr. S. C. Srinivasachariar be severely censured for his conduct in this matter but that, having regard to the events that have happened, this Court does not think it necessary to inflict upon him any further sentence than he has inflicted upon himself of suspension from practice.

A. S. V. *Pleader censured.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR WILLIAM PHILLIPS, *Kt.*, *Officiating Chief Justice*, MR. JUSTICE RAMESAM AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax, Madras ... *Referring Officer**

v.

Messrs. Binny & Co. (London), by agents Messrs. Binny & Co., Madras ... *Assessee.*

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Commissioner of Income-tax, Madras *v.* Messrs. Binny & Co.

Income-tax Act of 1922, S. 50—Words "tax was recovered"—Meaning of.

The words "tax was recovered" in S. 50 of the Indian Income-tax Act of 1922 mean "tax was recovered by the Government" and not "tax was refunded to the assessee under the provisions of S. 27 of the Finance Act of 1920."

Case stated under S. 66 (1) of Act XI of 1922 by the Commissioner of Income-tax, Madras, in the matter of Messrs. Binny & Co., Limited (London), by agents Messrs Binny & Co. (Madras).

1. Under S. 66 (1) of the Income-tax Act the Commissioner of Income-tax, Madras, referred for the opinion of the Hon'ble the Judges of the High Court the following question of law:

"What is the meaning of the words 'tax was recovered' in S. 50 of the Indian Income-tax Act? In the case of a company which has made a direct payment of Indian income-tax on assessment and which is applying for double income-tax relief under S. 49, do the words 'tax was recovered' mean 'Indian income-tax was paid in India' or do they mean 'relief was obtained in the United Kingdom under S. 27 of the United Kingdom Finance Act, 1920' or 'United Kingdom income-tax was paid in the United Kingdom'."

2. In my opinion the words "tax was recovered" mean "Indian income-tax was paid in India". I am not certain what precise meaning is attached to the words "tax was recovered" by the petitioners. On receipt of their request for a reference to the High Court, I asked them to formulate the questions of law which they considered I ought to refer and to state on what precise ground they based their claim for a refund. In reply their Solicitors have sent me three questions which consist chiefly of arguments and which contain alternative grounds for the claim. I do not consider that the questions as drafted by

*R. C. No. 7 of 1926. 5th September, 1927.

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the Solicitors are suitable for reference and I accordingly submit the question as framed in paragraph 1.

3. The facts of the case are that petitioners Messrs. Binny & Co. (London) were assessed to income-tax for the years 1922-23, 1923-24 and 1924-25. The tax due for 1922-23 was paid finally in April, 1923, that for 1923-24 in November, 1923 and that for 1924-25 in September, 1924. On 17th December, 1924 Messrs. Binny & Co. obtained from the United Kingdom Revenue Authorities the certificate required by S. 49 showing the rate of tax levied in the United Kingdom and the rate of relief obtained there. On 29th August, 1925, they applied to the Income-tax Officer, First Circle, Madras, for the double income-tax relief from Indian revenues for 1922-23 and on 4th September, 1925 for the relief for 1923-24. For 1924-25 the application for relief was made on 8th September, 1925. It was granted but relief for 1922-23 and 1923-24 was refused on the ground that the applications dated 29th August and 4th September were made more than one year after the last day of the year on which the taxes for 1922-23 and 1923-24 had been paid. In the view of the Income-tax Department the claims for these years should have been made before 31st March, 1925. They were thus late by about five months.

4. As I have said, I am not clear on what grounds Messrs. Binny & Co. consider that their claims are not time-barred. In the correspondence which has taken place since their claim was refused they have set up various pleas, (*a*) firstly, they claim that there has been no unnecessary delay on their part. As the English assessments had been delayed they were only able to secure the English certificate in December, 1924. After that, the London Office, relying on a Resolution of the Indian Central Board of Revenue, No. 1283, dated 28th April, 1924 (copy of which is appended, Ex. A) made a claim for the Indian refund to the High Commissioner for India in London. The London Office was informed by the High Commissioner that the claim had to be made in Madras. Its letter, dated 29th July, 1925, to this effect reached the Madras Office on 20th August and the claims were made as soon after that as possible. This explanation for the delay which occurred between December, 1924 and March, 1925 seems to me quite unacceptable. In any event it is a matter which does not involve any question of law. It will be observed that the Resolution of the Central Board of Revenue has nothing whatever to do

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with claims to refunds under S. 49 of the Indian Income-tax Act. It relates solely to claims to refunds under S. 48.

(b) Secondly, Messrs. Binny & Co. have argued that according to the ordinary use of the word "recovery" in the sense of getting back something which one has paid, the words "tax was recovered" must mean "relief was obtained". While it is true that the word "recovery" in every-day use conveys the idea of getting back something which one has paid previously, it seems to me clearly that to adopt that meaning in S. 50 would make that section nonsense. In the first place S. 50 refers not only to S. 49 but also to S. 48. The words "tax was recovered" in S. 50 must be so interpreted as to make them applicable both to refunds under S. 48 and to refunds under S. 49. However low an opinion one may hold of the draftsmen of Indian Acts, it is surely impossible to believe that they would have enacted that a refund on a dividend under S. 48 would be time-barred if it was not claimed within one year from the last day of the year in which the refund was made. Secondly, it is quite clear that throughout the Indian Income-tax Act "recovery" is used in the technical sense to mean collection, *see*, for instance, Ss. 18 (8), 44-A, 40, 41 and 68, second proviso. In all these sections "recovery" can bear no meaning except "collection". The technical term "recovery" is used instead of the plain word "collection" because Government may obtain the tax by various means, by actual direct collection on assessment, by deduction at source, and by indirect taxation such as a shareholder suffers. The word "collected" would not cover all these different methods by which revenue is credited to Government. Hence the necessity for the adoption of a wide expression such as "recovery". Lastly, if the draftsmen of the Act had intended the words "tax was recovered" to have the meaning now suggested they would surely have repeated the language of S. 49 where a taxpayer who recovers tax already paid is described as having "obtained relief". S. 50 would then have run "No claim to any refund of income-tax under this chapter shall be allowed, unless it is made within one year from the last day of the year in which relief was obtained under S. 27 of the Finance Act, 1920". A separate sub-section would also have been inserted to impose a time-limit on the operation of S. 48.

(c) Thirdly, it has been contended that if "tax was recovered" means "tax was collected" it must mean "tax was

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collected in the United Kingdom". This interpretation of S. 50 seems to me no less impossible than the one discussed above. The word "tax" at the end of S. 50 must refer to the same tax as that mentioned at the beginning of the section, *i. e.*, to the Indian tax. The refund that is to be given in India is a refund of Indian income-tax and India obviously cannot refund a tax which it did not collect.

5. The only real basis for the claim of Messrs. Binny & Co. is that implied in the third question formulated by their lawyers Messrs. Moresby & Co., viz., that my interpretation of S. 50 may render the agreement for double income-tax relief inoperative. Of course it renders the agreement inoperative in certain cases. S. 50 was intended to have this effect and I can see nothing unreasonable in the Legislature, which was giving a concession, laying down conditions for the grant of that concession. Just as the Legislature said in S. 49 that the rate of relief to be given in India shall not exceed half the Indian rate so they said that claims must be made within one year. If my interpretation of S. 50, which I claim is the natural and obvious one, made it practically impossible for any one ever to obtain double income-tax relief in India I would agree that an alternative interpretation that obviated this result without doing violence to the language of the statute would be preferable. But that this is not the case is proved by these facts: (*i*) that in three years since the arrangement came into force we have in Madras dealt with 22 applications, given refunds amounting to nearly Rs. 6,00,000 in 18 cases and only rejected 4 cases, including the two now under consideration as time barred; (*ii*) that if Messrs. Binny & Co. had made a previous study of the Act and if they had not misread Central Board of Revenue Circular No. 1283, dated 28th April, 1924, they would have had 3½ months in which to submit their claim after they received the certificate from the United Kingdom Revenue Authorities.

6. I may add that both the interpretations suggested by Messrs. Binny & Co. are inconsistent with the ruling given by the Bombay High Court in Referred Case No. 20 of 1924 in which on a reference regarding refund of dividends the Court passed the following order: "The Court is of opinion that income-tax is 'recovered' when the dividend is paid."

M. Patanjali Sastri, Special Counsel for Income-tax Dept. on behalf of the Referring Officer.

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Vere Mocket, Counsel, instructed by *Messrs. Moresby & Co.*, Attorneys for respondent.

The Court delivered the following

JUDGMENT :—What we are asked to determine is the meaning of the words "tax was recovered" in S. 50 of the Indian Income-tax Act. It is contended by the assessee that the word "recovered" which ordinarily has the meaning of taking back must refer to the repayment of the tax in the United Kingdom referred to in S. 49 and that the words "tax was recovered" must be read as meaning tax was refunded to the assessee under the provisions of S. 27 of the Finance Act of 1920. Unfortunately for this contention we see that S.50 is applicable not only to S. 49 but also to S. 48; and if we are to apply this meaning of the word "recovered" to S. 48, it would mean that when a person had obtained a refund under S. 48 he is given under S. 50 another year within which to apply for that same refund. It certainly makes nonsense of these two sections. The word "recovered" does not necessarily mean the actual taking back of what has been given as is obvious from its use throughout the Income-tax Act. In S. 18 (8) which deals with "deduction of tax in advance," it is observed that "the power to levy by deduction under this section shall be without prejudice to any other mode of recovery," implying thereby that deduction is one mode of recovery. Similarly, under S. 41, tax is "recoverable" from the Court of Wards, Administrator-General, etc., and there it does not mean taken back. It is suggested that tax can only be "recovered" by coercive process. The Act does not provide for recovery by coercive process, but even then there is no taking back of what has been given any more than when the tax is received by voluntary payment. Possibly there is an implication in the word "recover" that the tax is a sum, which has to be deducted out of the income, as really belonging to the Government, and in that sense the word "recovered" would bear the meaning of taking back. S. 44 (*a*) is also a very strong argument against the assessee's contention as to the meaning of the word "recovered". We are therefore satisfied that the words "tax was recovered" mean "tax was recovered by the Government".

It has been pointed out to us that this interpretation may cause hardship in individual cases where there has been delay on the part of the Income-tax authorities in England in making the refund there, such delay not being due to the default of the

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assessee. We would point out that this hardship can only be obviated by an amendment of S. 50 and we are of opinion that this should be done by giving the Income-tax Commissioner power to extend the time in suitable cases.

The petitioner will pay the costs of this application, *i. e.*, counsel's fee Rs. 250.

A. S. V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE JACKSON.

Kola Surayya and others ... *Appellants** (*Plaintiffs* 1, 2 *and* 4)

v.

Kola Subbamma and others ... *Respondents* (*Defendants* 2, 4, 6, 8, 9 *and* 11 *to* 20).

Surayya v. Subbamma.

Limitation Act, S. 7—Sale by guardian of minor brothers—Eldest brother attaining majority not suing in time to set aside the sale—Suit by younger brothers—If barred—Hindu Law—Paternal grandmother—If the natural guardian.

In the case of an alienation made by the guardian of minor brothers, if the eldest brother on attaining majority does not institute a suit to set aside the alienation within the time limited by law, any suit by the younger brothers is barred by limitation.

Doraisami v. *Nondisami*, (1912) I L R 38 M 118 : 25 M L J 405 (F B) followed.

Under the Hindu Law, in the absence of the father and the mother, the paternal grandmother is the natural guardian of the grandchildren.

Thayammal v. *Kuppanna Goundan*, (1914) I L R 38 M 1125 : 27 M L J 285 referred to.

Second Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. No. 175 of 1923 preferred against the decree of the Court of the Additional District Munsif of Rajahmundry in O. S. No. 440 of 1918.

Ch. Raghava Rao for appellants.

V. Viyyanna for respondents.

The Court delivered the following

JUDGMENT :—The first point urged in the Second Appeal is that the suit is not barred by limitation so far as the plaintiffs are concerned, even though it might be barred so far as the 1st defendant is concerned. The eldest brother who had attained majority did not sue in time to set aside the sale made by the

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*S. A. No. 1412 of 1924. 4th May, 1927.

Surayya v. Subbamma.

second defendant, the paternal grandmother and guardian of the plaintiffs and the 1st defendant during their minority. The point is clearly covered by the decision in *Doraisami* v. *Nondisami* (1), wherein it was held that if the eldest brother, who is naturally the managing member of the family, does not bring a suit within the time to set aside an alienation, any suit by an younger brother would be barred inasmuch as the suit is barred against the elder brother. Mr. Raghava Rao, who appears for the appellants, contends that the authority of *Doraisami* v. *Nondisami* (1) is considerably shaken by the decision of the Privy Council in *Jawahir Singh* v. *Udai Parkash* (2). In that case, their Lordships did not deal specifically with the case in *Doraisami* v. *Nondisami* (1). They simply say that they agree with the High Court of Allahabad as regards the question of limitation, but unfortunately the judgment of the Allahabad High Court is not before us and we do not know on what grounds the learned Judges who decided that case distinguished that case from the case in *Doraisami* v. *Nondisami* (1). The authority of *Doraisami* v. *Nondisami* (1) has not been challenged so far as it has been brought to our notice by any decision of this Court. We are therefore bound to accept the authority of *Doraisami* v. *Nondisami* (1) as binding upon us. The point urged by the appellants cannot therefore be sustained in view of the decision in *Doraisami* v. *Nondisami* (1).

The next point urged is that the paternal grandmother is not the natural guardian of the plaintiffs and therefore the shorter period of limitation is not applicable to the case. There is an observation of Sadasiva Aiyar, J., in *Thayammal* v. *Kuppanna Goundan* (3) " that nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to be and to act as the guardian of the minor's person and properties " This observation of the learned Judge is relied upon by Mr. Trevelyan in his well-known book on "Minors". There is also an observation of Mr. Justice Banerjee in *Mohamud Mondul* v. *Nafur Mondul* (4) that "it is not questioned and cannot be very well questioned that the *de facto* manager

1. (1912) I L R 38 M 118 : 25 M L J 405 (F. B.).
2. (1925) I L R 48 A 152 : 50 M L J 344 (P C).
3. (1914) I L R 38 M 1125 at 1126 : 27 M L J 285.
4. (1899) I L R 26 C 820 at 825.

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answers to the description of the natural guardian in this case." In that case, the paternal grandmother acted as the guardian of the person and property of the minor. There is no direct authority for the contention that the paternal grandmother is not the natural guardian of her grand-children in the absence of their father and mother. Considering the habits and customs of the people of this part of the country, there is no reason why the paternal grandmother should not be considered as the natural guardian of her grand-children in the absence of their father and their mother. We think that, in the absence of the father and the mother, the paternal grandmother is the natural guardian of her grand-children. We find this point against the appellants and, in the result, the Second Appeal fails and is dismissed with costs.

N. S. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[IN THE ORDINARY ORIGINAL CIVIL JURISDICTION.]

MR. JUSTICE VENKATASUBBA RAO.

A. Krishnaswami Aiyar ... *Plaintiff**

v.

Tatha Raghaviah Chetty and another ... *Defendants.*

Krishnaswami Aiyar v. Raghaviah Chetty.

Third party procedure—Madras High Court Original Side Rules, O. 5-A —Suit on a mortgage by mortgagee against mortgagor—Money entrusted by another with a third person to pay off and redeem mortgage—Whether third party procedure available against the third person—Relation of trustee and cestui que trust*—Right of indemnity of* cestui que trust *against trustee—Essentials for the applicability of third party procedure, considered and discussed.*

In a suit by the plaintiff, the mortgagee, against the 1st defendant, the mortgagor, the latter applied under O. 5-A of the Madras Original Side Rules by way of third party procedure against the 2nd defendant who was already a party to the suit on the ground that the 2nd defendant was entrusted with a sum of money by a third person with which he was directed to redeem the mortgage on the property.

Held, that in such a case the third party procedure was available to the 1st defendant against the 2nd defendant.

Under the circumstances the 2nd defendant was constituted a trustee for the 1st defendant who was entitled to be indemnified against the trustee, the 2nd defendant, in respect of the amount. The claim of the 1st defendant is not under the circumstances one for damages but for indemnity.

A right to indemnity ordinarily arises under the law by express contract or by implied contract, or where the position of the parties is such that either at law or in equity there is an obligation on the one party to

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* C. S. No. 42 of 1927. 4th October, 1927.

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indemnify the other or if there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify or lastly by statute.

A *cestui que trust* has in a proper case a right of indemnity against the trustee.

Eastern Shipping Co. v. *Quah Beng Kee*, (1924) A. C. 177 referred to.

The requisites of a third party procedure considered and discussed with reference to the English cases.

The Court will not refuse to apply the third party procedure merely because the case raises questions of difficulty.

A *prima facie* case within the meaning of the rule relating to third party procedure would arise when on the facts alleged a right to indemnity exists.

Catshore v. *North Eastern Railway Co.*, (1885) 29 Ch. Div. 344, and *Edison and Swan United Electric Light Co.* v. *Holland*, (1886) 33 Ch. Div. 497 followed.

M. Subbaroya Aiyar for plaintiff.

V. Ramaswami Aiyar with *R. Tirumalai Thathachariar* for 1st defendant.

A. Suryanarayana for 2nd defendant.

The Court delivered the following

JUDGMENT :—This application is made under O. 5-A of the Original Side Rules. These provisions relate to what is known as "third party procedure" and were framed only recently and I understand that this is the first application made in this Court under this Order.

The plaintiff's action is one to enforce a mortgage created by the 1st defendant and the latter claims indemnity as against the 2nd defendant. The facts which according to the 1st defendant give rise to his claim are these: The 2nd defendant is the elder brother of the 1st and they had a sister by name Sitamma. She wanted to help the 1st defendant who was in difficulties and with that object entrusted the 2nd defendant with a sum of Rs. 50,000 directing him to redeem the suit house which was the ancestral house of the 1st defendant and thus free it from the suit mortgage to which it was subject and hand it over to the 1st defendant. The latter who is the applicant asks that the question raised should be determined in this action under these rules and that a decree should be passed in his favour against the 2nd defendant.

On the facts alleged by the applicant there can be no doubt that the transaction amounts to a trust. This word is thus defined in S. 3 of the Indian Trusts Act:

"A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner."

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Sitamma is the author of the trust, the 2nd defendant is the trustee, the 1st defendant is the beneficiary, the sum of Rs. 50,000 is the trust money and the beneficial interest of the 1st defendant is his right against the 2nd defendant as owner of the trust property. It seems to me that all the ingredients necessary to constitute a trust are present in this case but the more important question to decide is, is the claim of the 1st defendant against the second, a claim to damages or a claim to indemnity? It is well settled that the third party procedure is applicable only to claims to indemnity and not to claims to damages. See *B. & D. Land Company* v. *L. & N. W. Railway Company* (1). Is then a *cestui que trust* entitled to indemnity as against his trustee? The English cases establish that a right to indemnity may arise in several ways.

(*a*) *First,* it may be created by express contract, that is, if it is given in terms by the contract itself between the two parties.

(*b*) *Secondly,* it may arise by implied contract, that is, if the true inference to be drawn from the facts is, that the parties intended such indemnity even if they did not express themselves to that effect. As an instance, if *A* requests *B* to do a thing for him and *B* by reason of doing that act is subject to some liability, then from *A's* request to do the act, the law implies a contract by him to indemnify *B* for the loss.

Now in the case of contracts, right to indemnity must be carefully distinguished from right to damages. A right to indemnity is given by the original contract, whereas a right to damages arises in consequence of the breach of that contract. These two rights are confounded and one reason for the confusion is, that when a contract is broken, indemnity is often found to coincide with the measure of damages. In those cases, whether the right is called right to indemnity of right to damages practically the same result follows, and it is forgotten that these two words express two fundamentally different legal ideas.

(*c*) The position of the parties is such that either in law or in equity there is an obligation on the one party to indemnify the other.

(*d*) If there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify.

[Cases (*c*) and (*d*) are generally treated as falling under "implied contract".]

1. (1886) 34 Ch. Div. 261.

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(e) A right to indemnity may be given by statute. These are some of the cases—the enumeration may not be exhaustive—where a right to indemnity arises.

We are now concerned with clause (c), that is, where the Court comes to the conclusion from the position of the parties that either in law or in equity there is an obligation cast upon the one party to indemnify the other. To this class belongs the case of trustee and *cestui que trust.* From the position the parties occupy, a trustee has a right to be indemnified by the *cestui que trust* against liabilities which he has incurred. "It is settled," say their Lordships of the Privy Council, in *Hardoon* v. *Belilios* (2)

"that speaking generally absolute beneficial owners of property must in equity bear the burdens incidental to its ownership and not throw such burdens on their trustees."

The reason is stated in these words:

"The plainest principles of justice require that the *cestui que trust* who gets all the benefit of the property should bear its burden unless he can show some good reason why his trustee should bear them himself. The obligation is equitable and not legal" (p. 123).

The right to indemnity thus exists on the part of a trustee as against his *cestui que trust.* Does the converse right exist, that is to say, has a *cestui que trust* a right to indemnity as against his trustee? That is the question I have to decide.

That such a right exists has been decided by the Judicial Committee of the Privy Council in *Eastern Shipping Co.* v. *Quah Beng Kee* (3). After enumerating the cases where a right to indemnity exists which have been very fully dealt with in *B. & D. Land Company* v. *L. & N.W. Railway Company* (1) and which have been referred to by me above, their Lordships observe thus:

"The question of indemnity commonly arises in the case in which a trustee claims to be indemnified by his *cestui que trust.* This class of cases was particularly discussed by Lord Lindley in *Hardoon* v. *Belilios* (2). The present case is the converse."

The facts of that case were these: The owners of a wharf granted a Shipping Company a right to berth their ships at that wharf subject to certain liability for damage caused. The defendant, the Managing Director of that Company, gave instructions without the company's authority that a ship which he himself had chartered for his own benefit should berth at the wharf. Owing to the unskilful way in which the ship was

1. (1886) 34 Ch. Div. 261. 2. (1901) A C 118 at 123.
3. (1924) A C 177.

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unloaded the wharf collapsed. The owners of the wharf sued the Shipping Company for damages and the latter served a third party notice upon the Managing Director and claimed that he should indemnify them against any damages for which they should be held liable. The question that arose was whether the Shipping Company had against their Director a right of indemnity. Their Lordships thus proceed:

"Beng Kee (the Managing Director) has been found to stand in fiduciary relation to the Eastern Shipping Company, and the latter claim indemnity from him in respect of liability imposed upon them by his abuse of powers in the exercise of which he owed them a duty and was responsible as a trustee of those powers. He was not a trustee in the full sense of that word. No property was vested in him. But he was a trustee of his powers in the sense that they were vested in him in such manner that he stood in a fiduciary relation to the company in respect of his exercise of those powers."

The passage which I find most helpful is the following:

"The nearest simile that was put in argument was that of a trustee in the fullest sense of the word who abuses his powers; say the trustee of real estate with power to mortgage who mortgages for his own benefit and in breach of his duty as trustee and puts the mortgage money into his own pocket. In such a case an action would lie in the Chancery Division for a declaration that the defendant was guilty of breach of trust and was liable to indemnify the *cestui que trust* against the mortgage, and for an order that he do redeem the mortgaged property and indemnify the *cestui que trust* against the mortgage debt."

The facts of the present case seem to closely resemble the facts of the case put. The trustee in the latter case wrongfully mortgages the beneficiary's property and applies the money to his own use. In the present case the trustee wrongfully appropriates the trust money and fails to utilise it in redeeming the beneficiary's property. If in one case the *cestui que trust* has a right to be indemnified, it seems to me that in the other case he has equally that right. I therefore decide this point in favour of the applicant.

I have now dealt with the main question raised, but there are some subsidiary points which have been argued and I shall now proceed to deal with them.

It is contended for the 2nd defendant that the application has been made too late and that the delay is fatal to it. Under the English rules, it may be taken as settled that that the application cannot be made until after the defendant has entered an appearance in the action. It should further be made promptly and as a rule before the defence is delivered, so that the notice

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may be served within the time limited for delivering the defence. (See *The Yearly Practice of the Supreme Court for* 1927, Vol. I, p. 236.) R. 1 of O. 5-A of the Original Side Rules in effect reproduces this provision in regard to the service of the notice. The 2nd defendant contends that this provision has been infringed. For dealing with this point, it may be useful to glance at the rules. They provide that where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the suit, he may by leave of the Court or Judge issue a notice (called the third party notice) to that effect sealed with the seal of the Court. Such notice shall generally be served within the time limited for delivering the defence. This is the procedure to be adopted when the party against whom relief is claimed by the defendant is not a party to the suit. But where the defendant claims relief against any other defendant already on the record, the rule applicable is R. 8 of O. 5-A. In this case the same procedure is to be adopted as if the last-mentioned defendant were a third party with the exception that no leave of the Court is required for service of the notice. *Towse* v. *Loveridge* (4). Bearing these rules in mind let us see what has happened in the present case. The plaint was filed on the 20th January, 1927, the 1st defendant filed his written statement on the 26th February, 1927 and the 2nd defendant filed his statement on the 19th April, 1927, on which date the present rules came into force. The application for the issue of the third party notice could, of course, not be made before the 19th of April, as such procedure was unknown on the Original Side before that date. The time for filing the written statement of the 1st defendant had expired on the 26th of February. Under the rules, strictly, the third party notice ought to have been served before that date. But in this case, that course was impossible as this procedure did not then obtain on the Original Side. The Court closed for the long vacation on the 7th of May and re-opened on the 18th of July. The case was posted before me for the settlement of issues on the 19th. On that day, on behalf of the 1st defendant it was said that he intended to claim under the third party procedure, indemnity from the 2nd, on the allegations already made in the 1st defendant's written statement. The latter had no defence to the plaintiff's action and I passed a decree on the 19th in favour of the plaintiff against the 1st defendant. The 2nd defendant's

4. (1883) 25 Ch. Div. 76.

vakil then raised the contention that the question between the defendants *inter se* could not be gone into in this action and that this must be tried as a preliminary point. I accordingly made an order on the same date adjourning the case a fortnight for deciding this question. Generally, no doubt, the third party notice must be served within the time I have mentioned, but R. 1 shows that in special cases the delay may be excused, for according to that rule the notice shall be served within the time mentioned "unless otherwise ordered by the Master or Registrar." This is a very fit case for an order being made excusing the delay. Within a few days of the rules coming into force, the Court was closed and the application was made on the next day after the re-opening. Both the English rules and our rules give a discretion to the Judge to extend the time and in this case I am prepared to exercise the discretion in favour of the applicant. Such delay, as there has been, is excusable as the rules were new and it took some time for the parties to become aware of them.

To make my statement of facts complete, I must advert to one circumstance. The suit as originally filed was against the 1st defendant alone. He applied on the 21st February, 1927 that the present 2nd defendant should be brought on the record as a party and the Registrar made an order on the 22nd directing the 2nd defendant to be impleaded and he was accordingly brought on the record. It will be seen that at that time there were no rules relating to the third-party procedure. The 1st defendant's application was supported by an affidavit in which he set forth his claim to indemnity as against the 2nd defendant. But on those allegations he suggested that the decree in favour of the plaintiff should be passed both against himself and the 2nd defendant. It was in this manner that the 2nd defendant came on the record. These facts are entirely irrelevant for determining the questions that have been raised but I have set them out in order to remove any confusion that may arise on account of the somewhat peculiar facts of this case.

It is next urged by the 2nd defendant that in the exercise of my discretion I must dismiss him from being a third party to the action. It is undoubtedly true that the Judge has a discretion whether he will give directions or not. Per Lord Esher in *Baxter* v. *France* (5).

The very object of the third party procedure is to prevent multiplicity of actions. Some good reason must therefore be

5. (1895) 1 Q. B. 591 at 593.

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shown for the course which I am asked to adopt. If the third party proceedings will prejudice, embarrass or delay the plaintiff, the Court may refuse to give directions.

As neither of the defendants had any objection to a decree being passed in favour of the plaintiff on the suit mortgage such a decree was already passed and the ground therefore that the plaintiff will be prejudiced or embarrassed does not exist. The Court may refuse to adopt this procedure for another reason, namely, that the whole dispute between the defendant and the third party cannot be disposed of in the action itself. For instance, if the claim of the defendant against the third party is in part a claim to indemnity within the meaning of the third party procedure and in part to damages, this procedure will not cover the latter claim and it would remain therefore to be tried between the defendant and the third party in another action. In such a case the Court holds that the third party procedure is inapplicable [*Baxter* v. *France* (5) already cited]. Then the question remains, is the mere fact that the case presents some difficulty, a reason for refusing directions as has been urged for the 2nd defendant? The decision of the Privy Council in *Eastern Shipping Company* v. *Quah Beng Kee* (3) (to which I have already referred) shows clearly that the Court will not refuse to apply the procedure merely because the case raises a question of some difficulty. The trial Judge there held that the right claimed against the third party was only a right to damages and not to indemnity and that therefore the procedure was not applicable. The Appellate Court affirmed this judgment. The Privy Council taking a different view held that the right was a right to indemnity and applied the third party procedure. Can there be a clearer case than this to show that the mere fact that some doubtful question arises is not a reason to refuse to apply these rules? *Baxter* v. *France* (5) does not decide differently. In that case the Court refused to apply the procedure for various reasons, one reason being that the question raised was complicated and difficult. The discretion having been exercised by the Court of First Instance, the Court of Appeal refused to interfere. Apart from this consideration, I do not find that the question raised in the present case is so difficult or complicated that I must decline to adopt the procedure. In my opinion, the point is, as I have shown, covered by clear authority.

3. (1924) A. C. 177. 5. (1895) 1 Q. B. 591.

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It is next urged that the 1st defendant has not made out a *prima facie* case and that on that ground his application fails. The question is, what is meant by a *prima facie* case? In *Carshore* v. *N. E. Railway Co.* (6) Cotton, L. J., observes:

"If it could be shown that their claim, if substantiated, was not one for indemnity, but for something else, it would have been different; but this is a claim for indemnity within the meaning of the rule."

Fry, L. J., makes an observation to the same effect. The question to be asked is, on the facts alleged, does a right to indemnity exist? If this right is made out, the applicant has a *prima facie* claim and the Court will not enquire closely into the merits of that claim. Bacon, V. C., thus puts it tersely in the following passage:

"There is no doubt that the defendants were clearly right in taking out this summons; and to go into the nature of the indemnity would be a most idle and absurd thing for me to do. The rule is sufficient; the rule is plain; it is a case where an indemnity has been given." [*Edison and Swan United Electric Light Co.* v. *Holland,* (1886) 33 Ch. Div. 497 at 499.]

The Court might come to a different conclusion if the claim is entirely frivolous. *Carshore* v. *N. E. Railway Co.* (6).

In the result I am of the opinion that no valid ground has been shown for my refusing to give directions.

There remains one further question to be dealt with. For the 2nd defendant it is urged that there have been some irregularities in the procedure adopted and that therefore the application should be dismissed. I think this argument is scarcely tenable. When indemnity is claimed against a defendant who is already a party to the suit, I have pointed out that no leave of the Court is necessary to serve the notice. In this case, on the 19th of April, the 1st defendant gave notice to the 2nd defendant in Court that he intended to apply under the rules relating to the third party procedure. As a matter of fact, such an application was then and there made in Court and in the presence of the 2nd defendant, but the bar not having become familiar with these rules a written notice was not then served on him although this defect was later remedied. Is the absence of the written notice fatal to the application? I hold, in the circumstances, that it is not.

If the defendant desires the third party proceedings to continue, he must take out a summons for directions as to the further proceedings. On the hearing of this summons, the

6. (1885) 29 Ch. Div. 344 at 346.

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third party or the defendant already on the record as the case may be, may object that the case is not one in which the third party procedure is applicable. The second irregularity complained of occurred in the taking out of the summons for directions. On the day the case was taken up for hearing the 2nd defendant's objections, there was not before me a formal summons for directions. But it is obvious that every one came to the Court for arguing this very question, for, according to the order of the 19th July, that was the question that was to be argued and decided. The 2nd defendant was not prejudiced for he not only knew that this question was reserved by that order, but he actually came to Court to argue that very question. To cure the defect, a formal Judge's summons has since been filed and, in the circumstances, I must disallow the objection.

N. S. *Application granted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE JACKSON.

Jagannatha Pillai and others ... *Appellants** (*L. Rs. of the deceased 1st defendant*)

v.

Kathaperumal Pillai and others ... *Respondents* (*Plffs. Nos.* 2, 3 *and* 4 *and Defts. Nos.* 2, 3 *and* 4).

Jagannatha Pillai v. Kathaperumal Pillai.

Madras Estates Land Act, Ss. 189 *and* 192 *and Schedules A and B – Decree of Revenue Court—Sale in execution—Suit in Civil Court to set aside on the ground of fraud or material irregularity in publishing and conducting it—Maintainability—Point not raised in the Lower Courts—If can be allowed to be raised in Second Appeal—Interpretation of Statutes—Special Act—Right of action in a Civil Court when taken away.*

A suit lies in a Civil Court to set aside a sale held in execution of a decree of a Revenue Court on the ground of fraud or material irregularity in publishing and conducting it. Such a suit is not barred by Ss. 189 and 192 of the Madras Estates Land Act.

Observations to the contrary in *Jagannadha Charyulu* v. *Satyanarayana Varaprasada Rau,* (1919) I L R 43 M 351 : 37 M L J 106 disapproved.

The question as to the maintainability of the suit itself may be allowed to be raised for the first time in Second Appeal.

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*S. A. No. 1044 of 1924. 6th May, 1927.

Jagannatha Pillai v. Kathaperumal Pillai.

Per Devadoss, J. :—When a special Act specifically says that the right of action in a Civil Court is not taken away except in the cases specifically mentioned in the Act, it would be opposed to the principles of construction of a special Act to hold that it takes away the right of a party to seek redress in a Civil Court in other cases. The right of a person to seek relief in a Civil Court is a common law right and as long as he can show cause of action he can bring a suit for redress.

Second Appeal against the decree of the Court of the Subordinate Judge of Sivaganga in A. S. No. 115 of 1921 preferred against the decree of the Court of the District Munsif of Paramakudi in O. S. No. 546 of 1919.

R. Kesava Aiyangar for appellants.

T. V. Muthukrishna Aiyar, A. Swaminatha Aiyar and *V. K. Srinivasa Aiyangar* for respondents.

The Court delivered the following

Devadoss, J.

JUDGMENTS :—*Devadoss, J.* :—The plaintiffs' suit is for cancellation of a revenue sale of the plaint items on the ground that there was fraud and material irregularity in publishing and conducting it. Both the Lower Courts have found on the merits in plaintiffs' favour and set aside the sale. The legal representatives of the 1st defendant, the landholder, have preferred this Second Appeal.

The vakil for the appellants raises the contention that no suit lies to set aside a sale in execution of a rent decree on the ground of fraud or material irregularity in publishing and conducting the sale as a suit is barred under O. 21, R. 92, Civil Procedure Code. This point was not raised in the Lower Courts. But we allowed it to be raised as it affected the maintainability of the suit. The argument is that the provisions of the Civil Procedure Code of 1882 with a few exceptions are made applicable to the proceedings under the Estates Land Act and therefore a suit to set aside a sale is barred under S. 312 of the old Code corresponding to O. 21, R. 92 of the present Code, and a sale can only be set aside under S. 311 corresponding to O. 21, R. 90 of the present Code.

S. 192 of the Estates Land Act provides that, with a few exceptions, the provisions of the Civil Procedure Code shall apply to all suits and other proceedings under the Act so far as they are not inconsistent therewith. The question is, is a suit in a Civil Court for setting aside a revenue sale held in execution of a rent decree barred either by reason of S. 312 or by reason of the provisions contained in the Estates Land Act?. By S. 189 of the Act only certain classes of suits which are mentioned

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specifically in Schedules A and B are exempted from the cognizance of the Civil Court. The present suit is not one of those specifically mentioned in Parts A and B of the schedule. When the Act specifically says that the right of action in a Civil Court is not taken away except in the cases specifically mentioned in the Act it would be opposed to the principles of construction of a special Act to hold that it takes away the right of a party to seek redress in a Civil Court in other cases. The right of a person to seek relief in a Civil Court is a common law right and as long as he can show cause of action he can bring a suit for redress. In this case on the allegations made by the plaintiffs, they have a cause of action and unless the suit is expressly barred by some provision of the Estates Land Act they would be entitled to seek relief in the ordinary Civil Courts of the land.

It is urged for the respondents that S. 131 provides for setting aside the sale on payment of the purchase money in full, and S. 124 does not contain any provision for confirmation of the sale. Under S. 312 of the Civil Procedure Code the Court is required to pass an order confirming the sale if no application under S. 311 is made or if such application is made and disallowed. Under S. 124 the Collector is required to issue a certificate of sale to the purchaser if no application has been made under S. 131 or if an application has been made and rejected. As pointed out by Mr. Muthukrishna Aiyar, there is no remedy to the ryot if the Collector refuses to set aside the sale, for no appeal is provided against an order under S. 131. In the case of an order under S. 312 an appeal is provided for by S. 588, cl. 16. It is by reason of S. 132 that the provisions of Chapter VI are made applicable to the execution by a Revenue Court of any decree for arrears of rent. When no remedy is provided by the Act itself against the order under S. 131 and when it is not specifically enacted that the order of the Collector shall be conclusive, is it proper to hold that the party against whom the order is made has no remedy at all? Unless there be a specific provision in the Act itself, it would not be right to hold that the unsuccessful party is without a remedy.

It is urged by Mr. Muthukrishna Aiyar that even if S.312 be held to be a bar to a suit to set aside a revenue sale it does not bar a suit which is based upon fraud, for under the Civil Procedure Code of 1882 an application under S. 311 to set aside

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a sale could be made only on the ground of material irregularity in publishing and conducting it. Under the present Code O. 21, R. 90, an application could be made on the ground of fraud as well. It is unnecessary to consider this point at length as we are satisfied that the right of suit in a Civil Court to set aside a revenue sale is not taken away expressly or impliedly under the provisions of the Estates Land Act. S. 189 of the Estates Land Act takes away the jurisdiction of the Civil Court in the case of suits and applications of the nature specified in Parts A and B of the schedule to the Act, and there is no warrant for enlarging the scope of the exemption to other suits.

In *Rajagopala Aiyar* v. *Ramanujachariar* (1) it was held that a sale held in execution of a decree without notice as required by O. 21, R. 22 was a nullity. Could it be said that in the case of a revenue sale the non-compliance with the provisions of O. 21, R. 22 by a Revenue Court would not make the sale a nullity? and if it is a nullity, what is the remedy of the aggrieved party? The remedy could only be by resorting to a Civil Court for setting aside the sale. In the case of a sale by a landholder under the summary proceedings under Ss. 111 and 118 of the Estates Land Act it was held that the Revenue Court had no jurisdiction on an application by the landholder to set aside the sale on the ground of irregularity in the publication and conduct of the sale and, if such an order was passed, the purchaser could institute a suit in the Civil Court for a declaration that the order is *ultra vires* and void. Vide *Jagannadha Charyulu* v. *Satyanarayana Varaprasada Rau* (2). The observations of the learned Judges who decided that case with regard to suits to set aside sales in execution of rent decrees are only *obiter* and with very great respect I am unable to agree with them. On a full consideration of the relevant sections of the Estates Land Act, I have no hesitation in holding that a suit in a Civil Court is not barred by reason of the provisions of the Estates Land Act or by reason of the provisions contained in S. 312 of the old Code corresponding to O. 21, R. 92 of the present Code, which are applicable to the proceedings in execution of a rent decree.

There is no other point in the Second Appeal, which fails and is dismissed with costs of 1, 2 and 4 to 6 respondents.

1. (1923) I L R 47 M 288 : 46 M L J 104 (F B).
2. (1919) I L R 43 M 351 : 37 M L J 706.

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Jackson, J.

Jackson, J. :—In execution of a decree by a Revenue Court, the first defendant brought the property of the 1st plaintiff to sale. The 2nd plaintiff, his son, applied a month after the sale for two weeks' time in order to deposit the balance of the decree amount. This was refused (Ex. II). So plaintiffs have brought this suit in the Munsif's Court to set aside the sale as fraudulent.

The Lower Courts have decreed the suit. The question raised in Second Appeal is whether, having regard to S. 192 of the Madras Act, I of 1908, any such suit can lie. S. 192 enacts that subject to the other provisions of the Act, the provisions of the Code of Civil Procedure shall apply to all proceedings under the Act, so far as they are not inconsistent therewith. It specially provides in sub-clause (*a*) that (among other sections) O. 21, R. 83, the postponement of sales, O. 21, R. 89, the deposit of the sale amount, O. 21, R. 91, cancellation if judgment-debtor has no saleable interest, shall not apply. O. 43 is also not applicable.

It is argued that because O. 21, R. 92 is not specially excepted, therefore it applies. Under sub-clause (3) of that rule, no suit to set aside an order confirming a sale shall be brought by the person against whom the order is made. Therefore the present suit is incompetent. In support of this argument, the appellant relies upon *obiter dicta* in *Jagannadha Charyulu* v. *Satyanarayana Varaprasada Rau* (2).

There the question was whether an order under O. 21, R. 90 could be passed in the case of a sale not under a decree but under the special provisions of the Act, Ss. 111, 118 and 124. The learned Judges remark in passing that if the sale had been in execution of a decree passed by the Revenue Court O. 21, R. 92 would, by the force of S. 192 of Act I of 1908 have become applicable. S. 192 of Madras Act I of 1908 no doubt makes Rr. 90 and 92 applicable for these rules are not excepted in S. 192 (*a*).

With the greatest respect, now that this point has been substantially in issue and fully argued, I am not prepared to hold that O. 21, R. 92 must be applicable merely because it is not in terms made inapplicable by S. 192 (*a*).

S. 192 provides that where the procedure proper to any proceeding is not laid down by the provisions of the Act, it can be looked for in the Code of Civil Procedure. In the matter

2. (1919) I L R 43 M 351 : 37 M L J 706.

of sales in execution of a decree of the Revenue Court S. 132 lays down that the provisions of Chapter VI shall be applicable. In other words a ryot whose holding is sold up summarily under S. 77 (*ii*) and a ryot whose holding is sold up in execution of a decree of a Revenue Court, shall each alike undergo the procedure set forth from S. 111 to S. 131. It seems inconceivable that the Madras Legislature after fully providing for the procedure in this chapter, should have intended to import as a concurrent procedure, a maimed form of that prescribed under O. 21.

Thus under the Madras Act, the vendor is given a certificate under S. 124, and the vendee, if aggrieved, can sue before the Collector under S. 213, which also specially reserves under sub-clause (2) his right of action in a Civil Court unless such action is barred in Schedule A; under the Code of Civil Procedure, the sale is confirmed and becomes absolute under O. 21, R. 92; there is an appeal for the aggrieved party under O. 43; and no suit lies.

Under the procedure which, as now suggested, S. 192 is supposed to import, the sale is confirmed, and the aggrieved party has no appeal because S. 192 excludes Chapter (Order)43, and no suit, because O. 21, R. 92 precludes a suit.

Surely it is plain that the Madras Act, instead of introducing such anomalies, has confined the procedure to Chapter VI, as S. 134 in terms provides; and O. 21, R. 92 has no application because the very provision in S. 134 is a provision such as is contemplated by S. 192 as restricting the application of the Code of Civil Procedure to the Madras Estates Land Act. Once it is found that O. 21, R. 92 has no application, a civil suit clearly lies, because the only form of suit in which the ordinary jurisdiction is barred in Schedule A of the Madras Act at all resembling the present suit is that described in item 12 "to contest the right of sale of a holding"; and that is not the present suit. Here the plaintiff does not contest the right of sale; he pleads that the sale itself is fraudulent.

There is a concurrent finding of fraud.

I agree therefore that the appeal fails and must be dismissed with costs.

N. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

Rangasami Kanda Pillai ... *Petitioner** (1st *accused*).

Rangasami Kanda Pillai, *In re.*

Criminal Procedure Code, S. 423 (1) (*b*)—*Scope and applicability—Appellate Court being at one with the Lower Court as to the act committed but only differing as to the application of the law—Altering the finding from a more to a less grave offence but maintaining the same sentence - If amounts to enhancement of sentence.*

It is not open to an Appellate Court, when setting aside the conviction of one of two or more offences, to confirm the sentence imposed by the Trial Court. But where the Trial Court has convicted the accused for a single offence and the Appellate Court alters the finding to a less grave offence, it may do it either because it rejects certain evidence accepted by the Trial Court and finds that the act committed is in substance and in fact less grave than that imputed to him by the Trial Court, or because it applies the law differently as to the same facts, being at one with the Trial Court as to the act committed. In the latter case, that is to say, where the Appellate Court adopts the view taken by the original Court as to the act committed by the accused and only differs from it in its application of the law, neither the letter nor the spirit of S. 423 (1) (*b*) of the Criminal Procedure Code is broken by maintaining the sentence awarded by the Trial Court for the more grave offence, and the same does not amount to an enhancement of the sentence.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Stationary 2nd Class Magistrate of Negapatam in Criminal Appeal No. 14 of 1926 preferred against the judgment of the Stationary 2nd Class Magistrate of Negapatam in C. C. No. 595 of 1925.

V. L. Ethiraj and *A. S. Sivakaminathan* for petitioner.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—In this case the petitioner was convicted of voluntarily causing hurt with a dangerous weapon, under S. 324, Indian Penal Code, and was sentenced to rigorous imprisonment for two months. In appeal the conviction was altered into one under S. 323, Indian Penal Code, but the sentence was maintained. It is contended that, having altered the finding from a more to a less grave offence, the Appellate Court should have reduced the sentence, and that the omission to do so amounts to having enhanced it.

It is well-enough settled [see *Paramasiva Pillai* v. *Emperor* (1), *Ramanujam Pillai* v. *Emperor* (2), *In re*

*Cr. R. C. No. 306 of 1926. 12th October, 1926.
(Cr. R. Petition No. 270 of 1926).

1. (1906) I L R 30 M 48. 2. Weir, Vol. II, p. 487.

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Somasundaram Pillai (3), *Prola Narasimham* v. *Emperor* (4), *Emperor* v. *Varadan* (5)] that it is not open to an Appellate Court, when setting aside the conviction of one of two or more offences, to confirm the sentence imposed by the Trial Court. The reason is that, when (to take the simplest case) a single sentence is awarded for two offences, part of it must be deemed to have been incurred for the one offence and part for the other, so that to maintain the whole sentence for only one of the offences amounts to such an enhancement as is prohibited by S. 423 (1) (*b*), Cr. P. Code. Such cases present no analogy to a case like the present, nor has my attention been drawn to any reported decisions upon the point.

Speaking generally, an Appellate Court alters a finding from a graver to a less grave offence for one or other of two reasons either because it rejects certain evidence accepted by the Lower Court or because it applies the law differently to the same facts. An example of the former class of cases would be the reduction of robbery to theft by rejecting evidence of violence. An example of the latter would be the conversion of a finding from theft in a building to simple theft by putting a different construction upon the word "building" or its qualifying words in S. 380, Indian Penal Code. Now the difference between these two classes is this, that whereas in the one the Appellate Court finds that the act which the accused committed was in substance and in fact less grave than that imputed to him by the Trial Court; in the other class, the Courts are at one as to the act committed and only differ as to the application of the law. The former class of cases, I refrain from discussing, because the case now in point clearly belongs to the latter. The accused caused the injuries with a stick and although nothing was known of the dimensions or other qualities of the stick (except perhaps what could be gathered from the nature of the injuries) the Stationary Sub-Magistrate assumed without any discussion that it was a dangerous weapon. The Joint Magistrate very properly held that a stick is not *prima facie* a dangerous weapon, and altered the finding. The two Courts were at one as to the facts.

It appears to me that in applying that portion of S. 423 (1) (*b*), Cr. P. Code, which allows an Appellate Court to alter the finding maintaining the sentence but not so as to

3. (1908) 3 M L T 312. 4. (1911) 2 M W N 97.
5. (1910) 8 M L T 117.

Rangasami Kanda Pillai, *In re.*

enhance the same, the test of enhancement must be found not among the technicalities of penal definition but by answering the broad question:

"For this man's offence has the Appellate Court inflicted punishment more severe than that originally awarded?"

It may be open to argument whether in regard to my first class of cases, this question could be answered in the negative if the sentence were maintained. Using the same illustration it is to be supposed that, if the Trial Court itself had found not robbery but only theft proved it would have imposed a lighter sentence, so that the effect of its error, assuming that the Appellate Court maintains the sentence, will be that the accused receives a heavier punishment than he would otherwise have received. But where, as in the present instance the Appellate Court adopts the view taken by the Original Court as to the act committed by the accused and only differs from it in its application of the law neither the letter nor the spirit of S. 423, Criminal Procedure Code, seems to me to be broken by maintaining the sentence. There has been no enhancement.

The Criminal Revision Petition is therefore dismissed.

N. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

Veerabadra Pillai and others ... *Petitioners** (*Accused*)

Veerabadra Pillai, *In re.*

Indian Penal Code, S. 141—Assembly by persons for defending what they are possessed of—If unlawful.

Persons who have formed an assembly for the purpose of defending what they are possessed of, and what they *bona fide* believe to have a right to, whether it be tangible property or such a right as that to a supply of water, are not members of an unlawful assembly within the meaning of S. 141 of the Indian Penal Code.

Ganouri Lal Das v. *Queen-Empress,* (1889) I L R 16 C 206 distinguished. *Pachkauri* v. *Queen-Empress,* (1897) I L R 24 C 686 and *Bagh Singh* v. *Emperor,* (1923) 81 I C 113 followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Devakottai in Criminal Appeals Nos. 38 and 40 of 1926, preferred against the judgment of the Court of the Taluk Magistrate of Sivaganga in Calendar Case No. 161 of 1926.

*Cr. R. C. No. 873 of 1926. 3rd May, 1927.
(Cr. R. P. No. 755 of 1926.)

Veerabadra Pillai, *In re.*

V. L. Ethiraj for petitioners.

The Public Prosecutor for the Crown.

The Court made the following

ORDER :—The petitioners, 54 in number, were convicted of forming members of an unlawful assembly, under S. 143, Indian Penal Code, by the Taluk Magistrate of Sivaganga, and these convictions were confirmed on appeal to the Sub-Divisional Magistrate of Devakottai. For the purposes of this revision petition the following facts may be accepted. Sevalkanmoi, to which the petitioners belong, is a proprietary village and possesses a tank which irrigates their lands. The tank is fed by a channel, and a dispute arose with the ryots of Thevadiakanom village which is included in the Sivaganga Zamindari as to the right to the supply of water through this channel. The latter ryots erected a bund, marked BB, in the Commissioner's plan, which had the effect of diverting the water from the Sevalkanmoi tank and leading it to Thevadiakanom lands. The proprietor of Sevalkanmoi sued the ryots of Thevadiakanom (O.S. No. 107 of 1923) and obtained a decree directing them to remove the bund BB-1 and restore it to its original position A D. This was done by a Commissioner, in execution of the decree, on 28th and 29th October 1925. It may be noted that, whether by deliberate intention or otherwise, the Sivaganga Estate, which was under the Court of Wards, was not made a party to the proceedings. Subsequently the proprietor of Sevalkanmoi and some others, apprehending that the bund as restored by the Commissioner would be interfered with, petitioned the Sub-Divisional Magistrate, who passed an order under S. 144, Criminal Procedure Code, on 28th December, 1925, prohibitting those ryots of Thevadiakanom who had been parties to the suit from "preventing the petitioners in maintaining the original state of the bund". He declined to pass any such order against the Court of Wards' Assistant Tahsildar and some of the estate servants, on the ground that they were not parties to the suit. Maters standing thus, on 25th February, 1926, a large number of Sevalkanmoi ryots, including the petitioners, assembled at the scene, armed with sticks and spades clearly prepared to exert force should occasion arise. Intimation was sent to the Police, and a Sub-Inspector marched this body of persons to the Police station, disarmed them, released them on bail, and charge-sheeted them under S. 143, I. P. C.

The point which Mr. Ethiraj seeks to make in revision of the convictions under this section is that, granting the truth of

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the prosecution case (which indeed appears to me to be incontestable), the petitioners were concerned not to enforce their right or supposed right to the supply of water, but merely to maintain it; and that mere maintenance of a right by force or show of force will not constitute an assembly of five or more persons an unlawful assembly. The judgment of the learned Taluk Magistrate contains a clear finding that at the time of the occurrence the bund was in the condition to which the commissioner had restored it. The learned Sub-Divisional Magistrate's finding upon the point is very obscure, but if it amounts to holding that the petitioner's opponents had, after the execution of the decree by the Commissioner, restored the bund to the line BB-1, the learned Public Prosecutor is willing to concede that there is nothing in the evidence to support this finding. I may take it, therefore, that what the petitioners did was to assemble in force with the intention of resisting an apprehended attempt on the part of the estate officials or ryots to interfere with the bund as fixed by the Commissioner, that is to say, as it originally stood before the Thevadiakanom ryots changed its site. Now as against those of the ryots who had been parties to the suit, the petitioners had obtained a declaration of their right to have the bund as they wished it, and it has been so restored. It is true that they had not made the estate itself a party, but it may, I think, be taken that even as against the estate they entertained a *bona fide* belief that they were entitled to maintain the *status quo*. It is further clear that the petitioners were in actual possession of this right or supposed right at the time when the occurrence took place. That being so, there is clear authority in support of Mr. Ethiraj's proposition. A common illustration of the maintenance of a right by force is where persons receive information that the opposing party is going to dispossess them of a piece of land, and collect upon the land in force in order to resist such an attempt. An example of this class of cases is *Pachkauri* v. *Queen-Empress* (1), where it was held that, in such circumstances, the accused were justified in taking such precautions as they thought were required, and in so doing could not rightly be held to be members of an unlawful assembly. A similar case was similarly decided in *Silajit Mahto* v. *Emperor* (2). For an instance of the maintenance by force of a right to a water supply reference may be made to *Bagh Singh* v. *Emperor* (3). A more

1. (1897) I L R 24 C 686 2. (1909) I L R 36 C 865.
3. (1923) 81 I C 113.

Veerabadra Pillai, *In re.*

extreme case of the same kind, where the accused cut a bund which, in disobedience to an injunction, the complainant's party had constructed, was decided in the same sense in *Ram Nandan Prasad Singh* v. *Emperor* (4). The learned Public Prosecutor has drawn my attention to *Ganouri Lal Das* v. *The Queen Empress* (5), which also related to the forcible demolition of a bund which the accused considered to be an infringement of their rights. The facts of that case may be distinguished from those of the present case, as they have been distinguished in *Pachkauri* v. *Queen-Empress* (1), on the ground that when the accuseds' party arrived in force upon the scene their right had already been infringed. But it is certainly true that the judgment does not proceed upon the distinction between 'enforcement' and 'maintenance' and clearly lays down that to defend a right by force is to enforce it. I do not think that this view has been followed, and, if I may say so with all respect, I do not find that the passages cited from Dalton's Justice of the Peace and from Russell as expounding the English Law afford any authority for it. They relate to such assertive acts as making a forcible entry upon land to which a title is claimed, and removing a nuisance in a violent and tumultuous manner. I prefer accordingly to follow the other cases which I have cited, because it appears to me little short of self-evident that in defending what they are possessed of and *bona fide* believe they had a right to, whether it be tangible property or such a right as that to a supply of water, persons who have formed an assembly for that purpose do not render themselves criminally punishable.

I accordingly allow the petition, set aside the convictions and sentences, and direct that the fines, if paid, be refunded.

N. S. *Petition allowed.*

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1. (1897) I L R 24 C 686. 4. (1913) 17 C W N 1132.
5. (1889) I L R 16 C 206.

[PRIVY COUNCIL.]

[On appeal from the High Court of Judicature at Madras.]

PRESENT :—VISCOUNT DUNEDIN, LORD DARLING AND SIR LANCELOT SANDERSON.

Krishna Reddi ... *Appellant**

v.

Gandavaram Raghava Reddi and another ... *Respondents.*

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Civil Procedure Code of 1908, *S.* 100—*Findings of fact—Interference with—Jurisdiction in Second Appeal—First Appellate Court—Finding of fact before remand—Inconsistent finding after remand—Which prevails—Hindu Law—Joint family—Father—Sale-deeds by, found not to have effected a real transfer—Son's right to recover entire property purporting to be sold in case of.*

The findings of fact of the first Appellate Court are binding upon the High Court in Second Appeal, unless it can be said that there is no evidence to support them.

In a suit by a Hindu son for a declaration that two sale-deeds executed by his undivided father in respect of joint family properties were null and void and that he should be put in possession of the said properties on behalf of the joint family, the District Judge, in first appeal, found that a portion of the consideration for the sales represented debts binding upon the plaintiff which had been discharged by the vendee. He, however, held that the transactions were void even if consideration passed, because the alleged sales were not *bona fide* sales, but were resorted to to screen the properties in case the plaintiff should bring a suit. He, therefore, passed a decree setting aside the sale-deeds and directing the delivery to the plaintiff on behalf of the family of possession of the properties covered by the said deeds on payment of the amount of the debts which had been discharged by the vendee.

When the case went up on appeal, the High Court remanded the case to the District Judge for a finding on the issue whether as between the father and the vendee the sale-deeds effected a conveyance wholly or partially valid of the former's share to the latter. The District Judge submitted a finding based on evidence that the sales did not effect a conveyance of the father's share to the vendee. The High Court accepting that finding, *held* that the sale-deeds were null and void and not binding on the plaintiff's family and decreed that the vendee should unconditionally put the plaintiff in possession of the entire properties covered by the said deeds.

Held, that the finding of the District Judge before remand that the vendee did discharge family debts must be considered to have been eradicated by his finding on remand, that there was no consideration for either of the alleged sale-deeds, and that those deeds did not effect a real transfer of the properties, and that that finding on remand was binding upon the High Court.

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*P. C. Appeal No. 7 of 1924. 10th March, 1927.

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Held that, in view of those findings, the decree of the High Court mentioned above was right.

Quaere: Whether the vendee was in any event entitled to the share of the father in the properties purporting to be conveyed under the said sale-deeds.

Consolidated Appeal (No. 7 of 1924) from a decree of the High Court at Madras, dated 19th April, 1920, modifying a decree of a division Bench of the same Court, dated 15th February, 1918, in an Appeal from the District Court of Chingleput prefered against the judgment and decree of the Temproary Subordinate Judge of Chingleput.

K. V. L. Narasimham and *Subba Rao* for appellant.

De Gruyther, K. C., and *E. B. Raikes* for respondents.

10th March, 1927. The Judgment of their Lordships was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON :—This is an appeal by the plaintiff, Krishna Reddi, and a cross-appeal by Gandavaram Raghava Reddi and Kodur Venkataperumal Reddi, defendants 3 and 4, from a judgment and decree, dated the 19th April, 1920, of the High Court of Madras, in Letters Patent Appeal No. 23 of 1918.

The suit was brought as long ago as 1910, and it has had a chequered career. The first defendant, Varada, was the father of the second defendant, Venkatarama, and the plaintiff is the son of the second defendant, and they are members of a joint undivided Hindu family. Venkatarama, the second defendant, had two wives; by his first wife he had a daughter, and by the second he had an only son, viz., the plaintiff.

It was alleged on behalf of the plaintiff that he and his mother were obliged to leave the home of the second defendant and to live with the plaintiff's mother's people for some three and a-half years before the suit was brought.

The third, fourth, and fifth defendants were alleged to be close friends of the second defendant.

By a document, dated the 22nd January, 1910, the first defendant, Varada, purported to sell to the third defendant the properties comprised therein and specified in Schedule A to the plaint. The consideration was alleged to be Rs. 15,000, and the property was alleged to be the self-acquired property of the first defendant.

On the same day, the first and second defendants (the second defendant purporting to act for himself and his minor son, the plaintiff) by another document purported to convey

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to the fourth defendant the property comprised therein, and described in Schedule B to the plaint. The consideration was alleged to be Rs. 20,000, through a bond executed in favour of the second defendant for discharging certain debts specified therein, and also other family debts.

On the 9th February, 1910, the second defendant purported by means of an alleged deed of gift of that date, to give certain properties specified in Schedule C to the plaint in favour of a temple, of which the fifth defendant was trustee.

The plaintiff alleged that the properties specified in Schedules A, B, and C were joint family properties of the family, of which the plaintiff and the first and second defendants were members, that the above-mentioned alleged deeds of sale and the deed of gift were fradulent and devoid of consideration, that there was no legal necessity, and that the alleged deeds were nullities.

On the 31st January, 1910, the alleged deeds of sale were registered, in spite of the plaintiff's mother's objection before the Registrar.

The suit was brought on the 15th April, 1910, and the plaintiff claimed therein a declaration that the sale deeds and the deed of gift were null and void and that he should be put in possession of the above-mentioned properties on behalf of the joint family. There was an alternative prayer for partition in case it was held that the deeds were in any way binding on the interests of the first and second defendants.

The case of the contesting defendants, viz., defendants 3 and 4, was that the sales were *bona fide* and that consideration passed for them, and that title was intended to and did actually pass to them.

The first defendant was an old man, and it was alleged that the second defendant was acting as manager of the family.

The learned Subordinate Judge found that the sale deeds were made to defraud the plaintiff, that they were not *bona fide* to discharge antecedent debts, and that they were not valid as against the plaintiff to the extent of his share, viz., one-quarter. He held that the properties in Schedule A were joint family properties. This finding is not now disputed. He held, further, that the gift of the properties in Schedule C was invalid. This finding also is not now disputed.

While holding that there was consideration and that title was intended to pass under the two deeds of sale, he found

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there was no necessity for the sales and made a decree, dated the 15th April, 1913, that the defendants 3 and 4 should put the plaintiff in possession of his share of the properties on his paying into Court Rs. 2,945-11-6 (*i. e.*, one-quarter of Rs. 11,782-14-0), to be paid to the third and fourth defendants in the way they might arrange between themselves. It was further ordered that the fifth defendant should put the plaintiff in possession of the properties comprised in Schedule C.

The above-mentioned sum of Rs. 11,782-14-0 is explained by the fact that the learned Subordinate Judge found that debts to the extent of Rs. 11,782-14-0 had been discharged by the fourth defendant.

The plaintiff and the defendants 3 and 4 appealed against this decree to the learned District Judge. The plaintiff alleged that the alienations should have been set aside *in toto* as void, and the third and fourth defendants urged that the alienations were made for justifiable necessity and should have been upheld, and the plaintiff's suit should have been dismissed.

The learned District Judge held that Exhibits I and II, which are the alleged sale deeds of the 22nd January, 1910, were not *bona fide* sales, but were resorted to to screen the properties in case the plaintiff should bring a suit. In a later part of his judgment he held that in pursuance of a scheme to defraud the plaintiff or his family the alienations were made, and the third and fourth defendants actively participated in the fraud. He held, further, that the transactions were void even if consideration passed.

He made a decree reversing the decree of the Trial Court, in so far as it was against the plaintiff, and declaring that the plaintiff was entitled to get the sales of A and B schedule lands set aside, and that the plaintiff should recover possession of the said A and B schedule lands on behalf of the family on payment of Rs. 11,782-14-0, the amount of the debts which had been discharged by the fourth defendant. The plaintiff's appeal was allowed and the appeal of defendants 3 and 4 was dismissed.

Their Lordships understand that the decree of the learned Subordinate Judge, as regards the properties comprised in Schedule C, was not interfered with.

The defendants 3 and 4 appealed to the High Court of Madras and the plaintiff filed cross-objections. The learned Judges of the High Court who heard the appeal remanded the case to the Lower Appellate Court on the grounds that the

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learned District Judge had not recorded a formal decision on the question whether the alleged sale deeds effected any real alienations, and that the learned District Judge had apparently decided the appeal on the ground that in any event a finding that the sales were merely fraudulent was a sufficient basis for the grant of the relief asked for. They required the learned District Judge to submit findings on the following issues:—

(1) Whether the alienation of A and B scheduled properties is not supported by consideration?

(2) Did either or both of the documents, Exhibits I and II, effect a real transfer of the property which they purported to convey?

Exhibit I is the deed of 22nd January, 1910, in favour of Raghava (third defendant), and Exhibit II is the deed of 22nd January, 1910, in favour of Venkataperumal (the fourth defendant).

The learned District Judge on remand found that the real object in resorting to the sales was to screen the properties from the plaintiff and that no consideration really passed; that the parties did not intend that the transactions should be genuine, and that the promissory notes only served to give an appearance of truth to the transactions.

On the two above-mentioned issues he found that Exhibits I and II were not supported by consideration and that those documents did not effect a real transfer of the properties which they purported to transfer.

On the further hearing of the appeal and upon the above-mentioned findings of the learned District Judge, the learned Judges of the High Court were agreed that the Lower Court's findings must be accepted, and said that they would deal with the decree on the footing that as against the plaintiff at least the alienations of A and B schedule properties were not for consideration and that Exhibits I and II effected no real transfers.

Unfortunately, the learned Judges could not agree as to the course which should be adopted. They, however, came to the conclusion that the opinion of the senior Judge should prevail, and accordingly they directed that the learned District Judge should be called upon to submit a further finding as proposed in the judgment of the senior Judge. The case, therefore, was again remanded to the learned District Judge for a finding on the issue whether as between the first and second defendants and the third and fourth defendants Exhibits I and

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II effected a conveyance wholly or partially valid of the former's shares to the latter.

The learned District Judge submitted his finding as follows:—

"For these reasons and for those set forth in my previous finding, I find that, as between the first and second defendants and the third and fourth defendants, Exhibits I and II did not effect a conveyance of the former's share to the latter."

The appeal then came once more before the learned Judges of the High Court.

The senior Judge came to the conclusion that the appeal of the defendants 3 and 4 should be dismissed and that the plaintiff's memorandum of objections should be allowed.

The other learned Judge agreed that the final order should be as proposed by the senior Judge, but stated that he still adhered to the opinion which he expressed in his previous judgment and would have passed an order in the terms therein mentioned. The decree of the High Court, dated the 15th February, 1918, therefore, was to the effect that the decrees of the Lower Appellate Court and of the Court of first instance should be set aside and a declaration was made that the sale deeds of the 22nd January, 1910, and the deed of gift, dated the 9th February, 1910, were null and void and not binding on the plaintiff's family, and the Court further decreed that the defendants 3 and 4 should put the plaintiff in possession of the plaint A, B and C schedule properties, and that the Subordinate Judge should hold an enquiry regarding future mesne profits until date of delivery or three years from that date, whichever should be nearer, and pass a decree for them under O. XX, Rule 12. The decree contained a further direction for the payment by the defendants 3 and 4 of the plaintiff's costs.

This, however, was not the end of the proceedings in the High Court, for, as the learned Judges had differed, the defendants 3 and 4 appealed under the provisions of the Letters Patent from the decision of the learned senior Judge of the Division Bench. This appeal was heard by the learned Chief Justice and two other Judges of the High Court. The three learned Judges accepted the findings of the learned District Judge, which they stated were also accepted by the learned Judges of the Division Bench, viz., that the sales were purely sham transactions intended to defeat the plaintiff.

They then stated that the only other question for consideration was whether the learned District Judge was right in making

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the relief which he had given to the plaintiff dependent upon the payment of the sum paid by defendants 3 and 4 for the discharge of the joint family debts. It should be noted that this order of the learned District Judge was not quoted correctly. The relief given by the learned District Judge to the plaintiff was dependent upon the payment of the debts which had been discharged by the fourth defendant; there was no reference to any sum paid for the discharge of debts by the third defendant in the decree of the learned District Judge.

The learned Judges came to the conclusion that there was no reason for interfering with that part of the decree of the learned District Judge. They therefore decided to modify the decree made by the learned senior Judge of the Division Bench of the High Court by making the decree for possession dependent upon the payment by the plaintiff in the manner provided in the decree of the District Judge, and directing that the amount should bear interest at 6 per cent. from the date of the decree of the Subordinate Judge. The decree, as drawn up, directed that the defendants 3 and 4 should put the plaintiff in possession of the plaint A, B and C schedule properties on payment by the plaintiff of Rs. 11,782-14-0, and that the said amount should carry interest at 6 per cent. per annum from the 15th April, 1913, until the date of payment.

It is to be noted that the decree, as drawn up, went further than the judgment of the learned Judges who heard the Letters Patent appeal. The decree of the learned District Judge provided that the plaintiff should recover possession of the said A and B schedule lands on payment of the sum of Rs. 11,782-14-0.

The recovery of the Schedule C lands by the plaintiff was not dependent upon the payment of the said sum.

But the decree made by the learned Judges who heard the Letters Patent appeal made the recovery of the Schedule C lands dependent upon the above-mentioned payment, as well as the Schedule A and B lands.

Since the decree of the learned Subordinate Judge, which directed that the fifth defendant should put the plaintiff in possession of the Schedule C lands, there had been apparently no question as to this part of the case.

The decree in the Letters Patent appeal directed the defendants 3 and 4 to put the plaintiff in possession of the Schedule C lands, although, as far as their Lordships know, defendants 3 and 4 had nothing to do with the Sch. C lands.

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It is therefore apparent that the decree appealed from cannot stand in its present form.

There is, however, a serious question whether there is any reason why the decree of the Division Bench of the High Court, dated the 15th February, 1918, should be interfered with. It was argued on behalf of the defendants 3 and 4 before the Board that the learned Judges of the Division Bench of the High Court were wrong in remanding the case for a finding upon the two issues, which have already been referred to. Their Lordships are not prepared to hold that the learned Judges were wrong in remanding the case for a clear and definite finding upon the issues whether the alienation of A and B scheduled properties was not supported by consideration, and whether either or both of the documents, Exhibits I and II, effected a real transfer of the property which they purported to transfer.

Their Lordships agree with the learned Judges that definite findings on these issues were material and necessary.

If, then, the remand was not wrong, the findings of fact made by the learned District Judge upon these two issues were binding upon the High Court unless it could be said that there was no evidence to support them. Their Lordships are clearly of opinion that such an objection to the findings cannot be upheld. The findings of the learned District Judge were adopted by the learned Judges of the Division Bench which heard the second appeal and by the learned Judges who heard the Letters Patent appeal, and their Lordships see no reason for differing from the conclusion arrived at by all the High Court Judges in this respect.

There remains the question whether, in view of these findings, there was any ground for altering the decree of the Division Bench, dated the 15th February, 1918.

The learned Judges who heard the Letters Patent appeal apparently concluded that it would not be equitable to allow the plaintiff to recover possession of the A and B schedule property unless he paid the amount of the debts discharged by the fourth defendant. In view, however, of the above-mentioned findings, which must be accepted, it cannot be held that the fourth defendant did discharge family debts as alleged.

The finding to that effect, which may be said to arise from the learned District Judge's decree of the 26th February, 1915, must be considered to have been eradicated, when the learned District Judge, on remand and on further consideration of the

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evidence, came to the conclusion that there was no consideration for either of the alleged sale deeds, Exhibits I and II, and that these deeds did not effect a real transfer of the properties.

Subject to a further question which was raised by the learned counsel on behalf of the third and fourth defendants, their Lordships are of opinion that there was no ground for interfering with the decree of the Division Bench of the High Court, dated the 15th February, 1918.

The other point to which reference has been made is as follows:—It was argued on behalf of defendants 3 and 4 that, as between defendant No. 2 (viz., Venkatarama, the father of the plaintiff) and the defendants 3 and 4, there was no reason for holding that the transfer was not complete, and that a decree should be made declaring that the defendants 3 and 4 were entitled to the share of the defendant No. 2 in the above-mentioned properties.

Their Lordships are not satisfied that this point was raised before the learned Judges who heard the Letters Patent appeal, and in view of the findings of the learned District Judge, that no real transfer was intended or effected between the above-mentioned parties, they are not prepared to enter upon the question further.

For the reasons herein contained their Lordships will humbly advise His Majesty that the plaintiff's appeal should be allowed and that the defendants 3 and 4 should pay to him his costs of the appeal before this Board; that the decree of the High Court in the Letters Patent Appeal No. 23 of 1918, dated the 19th April, 1920, be set aside with costs, and that the decree of the High Court in Second Appeal No. 711 of 1915, dated, the 15th February, 1918, should be restored, and that the cross-appeal of the defendants 3 and 4 should be dismissed with costs.

Solicitors for appellants : *Douglas Grant* and *Dold.*

Solicitors for respondents : *T. L. Wilson & Co.*

Appeal allowed and cross-appeal dismissed.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WILLIAM PHILLIPS, KT., OFFICIATING CHIEF JUSTICE, MR. JUSTICE BEASLEY AND MR. JUSTICE ANANTHAKRISHNA AIYAR.

Ganshamdoss Narayandoss ... *Appellant**

v.

Gulab Bi Bai ... *Respondent.*

F. B. Narayandoss *v.* Gulab Bi Bai.

Succession Act, Ss 187, 25—Unprobated will—Defendant if and when can rely on—Heir-at-law—Suit by—Defendant if can rely on unprobated will in—Jus Tertii—*Plea of—When available to a defendant.*

By the F. B.: A defendant resisting a claim made by the plaintiff as heir-at-law cannot rely in defence on a will executed in his favour at Madras in respect of property situate in Madras when the will is not probated and no letters of administration with the will annexed have been granted.

A defendant can rely on an unprobated will, provided that he does not do so in order to establish a right under the will.

Per Ananthakrishna Aiyar, J. :—Under the general law a defendant's plea of *Jus tertii* cannot be entertained when he does not state in whom the right of suit resides. He must trace the title to a third party other than the plaintiff. A mere suggestion that there may be a third party with better title is nothing.

On appeal from the judgment of the Hon'ble Mr. Justice Kumaraswami Sastri, dated 29th October, 1924, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

K. S. Krishnaswami Aiyangar and *K. Bhashyam Aiyangar* for appellant.

C. Venkatasubramiah for respondent.

The Court (the Chief Justice and Curgenven, J.) made the following

ORDER OF REFERENCE:—*The Chief Justice*:—The plaintiff in this case is one Ganshamdoss Narayandoss, and he sued for the recovery of a house No. 2|100, perumal Mudali Street, impleading originally one Saraswathi Bai, who is now dead, and subsequently putting on the record Gulab Bi Bai, her legal representative. The property belonged to one Kaveri Bai, and it may be taken for the purposes of this reference that in the absence of a will, the plaintiff, Ganshamdoss Narayandoss, would be entitled to succeed Kaveri Bai in preference either to Saraswathi Bai or Gulab Bi Bai. The claim is resisted on the

The Chief Justice.

* O. S. Appeal No. 16 of 1925. 12th September, 1927.

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ground that Kaveri Bai left a will in favour of Saraswathi Bai. That will was not probated, and the question is whether it can be used to defeat the plaintiff's claim.

The plaintiff by paragraph 5 of his plaint alleges that Kaveri Bai died intestate on the 16th of October 1908. In my opinion that was an unnecessary allegation. But it resulted in the 1st issue in the suit being framed as follows: "Did Kaveri Bai die intestate as alleged in paragraph 5 of the plaint long after making her last will and testament as alleged in paragraph 3 of the written statement?" The learned Judge obviously attached importance to the form of the pleading and the issue, because he says this: "In the present case the plaintiff comes to Court saying that Kaveri Bai died intestate and that he is the heir under Hindu Law claiming by intestate succession." In my opinion that burden was not one which lay upon him and the allegation in the pleading was an unnecessary averment. I think that all he had to do was to prove that he was the next of kin of the last owner of the property, Kaveri Bai, and thereupon the burden of proof would be cast upon the defence to show that the defendant had a better title. It would be to my mind wholly wrong in this country to allow the burden of proof to be shifted by a redundant averment in the pleading or by an incautious acceptance of an issue framed upon that averment. I am therefore of opinion that it would be wrong in determining where the burden of proof lies in this case to rest it upon the form of pleading and the issue and that we ought to consider where the burden lies in law.

The learned Judge held that an unprobated will could be used to defeat the plaintiff's claim and reiterated the view which he had expressed on the subject in *Shadagopa Naidu* v. *Thirumalaswami Naidu* (1). The doctrine is alleged to be derived from the case of *Janaki* v. *Dhanu Lall* (2). I do not wish to embarrass the Full Bench by comments on the cases which will be discussed before them. But I think it is very doubtful whether *Janaki* v. *Dhanu Lall* (2) really supports the proposition contended for though it was taken to establish that proposition in *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah* (3). I confess myself unable to ascertain what exactly was laid down in *Parthasarathi Aiyar* v. *Subbaraya Gramani* (4). On the other hand, the observations in *Lakshmamma* v. *Rathnamma* (5)

1. (1915) 18 M L T 129. 2. (1891) I L R 14 M 545.
3. (1909) I L R 33 M 91. 4. (1923) 45 M L J 175, at 181.
5. (1913) I L R 38 M 474 : 25 M L J 556.

seem clearly to tend in the opposite direction. My own view would be not merely that an unprobated will could not be used to establish title which is clearly forbidden by S. 187 of the Succession Act but that it could not be used as a weapon of defence when the onus was clearly thrown upon the defence. But I realize the difficulty created by S. 25 of the Succession Act which defines intestacy in the following words: "A man is considered to die intestate in respect of property of which he has not made testamentary disposition which is capable of taking effect." Where the evidence establishes a valid execution of a will, it is difficult to say that an unprobated will is not capable of taking effect, because it is obvious that as soon as probate is obtained it can take effect. The position would then be that the burden would be thrown upon the plaintiff by law, and not by the accident of the way in which he framed his pleading, of proving that the testatrix died intestate and that applying the definition of S. 25 this testarix did not die intestate. The practical inconvenience of putting an executor in the position of being able to refuse to take out probate and keep the presumptive heir-at-law at arm's length by an unprobated will requires no comment. In my opinion the matter had better be settled by a reference to a Full Bench and the question referred will be as follows: Can a defendant resisting a claim made by the plaintiff as heir-at-law rely in defence on a will executed in his favour at Madras in respect of property situte in Madras when the will is not probated and no letters of administration with the will annexed have been granted?

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Curgenven, J. :—This is an appeal against the judgment of Mr. Justice Kumaraswami Sastri in C. S. No. 755 of 1920 on the file of this Court. The property in suit consists of a house and site in Georgetown, Madras, valued in the plaint at Rs. 12,700. It belonged to one Kaveri Bai, sister of the plaintiff's father, and the plaintiff claimed to recover possession of it as her heir. The claim was resisted by a half-sister of Kaveri Bai's named Saraswathi Bai, who obtained possession upon Kaveri Bai's death in 1908 and who set up a will of Kaveri Bai's as the foundation of her title. Saraswathi died during suit, and her sister, Gulab Bi Bai, was brought on the record as her legal representative. The learned Judge has found in favour of the will and dismissed the suit, and the plaintiff appeals.

Curgenven, J.

The will was attacked on the grounds (*a*) that it was not genuine, (*b*) that it was not executed in accordance with law

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and (*c*) that being unprobated the defendant could not rest any claim upon it. Point (*a*) was given up in appeal. Points (*b*) and (*c*) remain for consideration.

The document purports to bear the mark of Kaveri Bai, to which is subscribed a declaration that it was "signed by the testatrix and acknowledged by her to be her last will and testament in the presence of us present at the same time who at her request and in our presence and in the presence of each other have subscribed our names as witnesses." There follow four signatures, the first in order being that of Mr. Seshacharlu, the Vakil who, as the evidence shows, prepared the will. Mr. Seshacharlu died not long afterwards, and although the genuineness of his signature is fully proved by his clerk, it cannot, I think, be presumed that it amounted to a valid attestation. Neither of the two reputed attestators who have been examined speaks to his presence at the execution of the document, and one would have expected that, had he been present, the words 'Mark of Kaveri Bai' would have been in his hand. It is not improbable that he signed as the author of the document. Of the other three persons whose signatures appear, two, Rangildoss and Poolji Vias, deposed respectively as defendants' 1st and 2nd witnesses. The learned Judge has alluded to the circumstance of Gulab Bi Bai's conversion to Muhammadanism as a reason for suspecting that any bias which these witnesses may have would be against her, so that, if evidence of valid attestation of the will can be derived from their statement, it may be accepted with little hesitation. Rangildoss stated that he saw Kaveri Bai put her mark, that he was asked to sign below and that he did so. That constitutes a valid attestation under S. 50 of the Succession Act. The account given by the other witness, Poolji Vias, is this: He was called to the house by the executor named in the will, Rancholedoss. Kaveri Bai was lying in bed ill. Rancholedoss told him that "it was the will of Kaveri Bai," and asked him to attest it. Kaveri Bai also said that he should sign, and he signed. He does not remember whether the testator's mark was already there, but it may be inferred from an answer which he gives to another question that Rangildoss's signature was already on the document, and there is Rangildoss's evidence that Kaveri Bai put the mark in his presence. Thus it is to be gathered from what Poolji Vias says that Kaveri Bai had already executed the will, that a statement was made to him in her presence that the will was hers, and that both

she and her executor asked the witness to attest it and he attested it. It remains for consideration whether this satisfies the requirement of S. 50 that an attesting witness, where he has not actually seen the testator, either by himself or by another under his direction, sign or affix his mark, must have received from the testator a personal acknowledgment of his signature or mark. A 'personal acknowledgment' of execution need not necessarily, I think, be restricted to an express statement to that effect, but may include words or conduct, or both, on the part of the testator which may be construed unequivocally as such an acknowledgment. Here we have not only a statement made in Kaveri Bai's presence that the will was hers, and a request to attest it—which evoked no disclaimer from her—but also her own request to the witness to sign. It appears to me that she thus conveyed to the witness an impression that she avowed execution no less certain than if she had made the avowal in terms. It was thus, by implication, an acknowledgment. It was a personal acknowledgment because the impression was created directly by her own words and conduct. I conclude, therefore, in agreement with the learned Judge, that this witness also validly attested the will, which has thus, so far as execution and attestation are concerned, been established.

The question now remains whether Saraswathi or her legal representative (she died pending suit) can resist the plaintiff's claim without obtaining probate of the will. The plaint alleged that Kaveri Bai had died intestate, and it appears to me that such an allegation was necessary, because, under Parts IV and V of the Succession Act, an heir-at-law can only succeed in the event of an intestacy. But since there is a presumption that a person dies intestate unless a will be established, it lay upon the defendant to disprove the fact of intestacy by establishing the existence of a will. That, I think, was the course followed in this suit. The defendant proved that Kaveri Bai had executed a will, but that proof was adduced otherwise than by producing probate, and the question is whether, by such proof, the plaintiff's claim is defeated.

By S. 25 of the Succession Act, a man is considered to die intestate in respect of property "of which he has not made a testamentary disposition which is capable of taking effect." Did Kaveri Bai make such a disposition? The answer, I think, is clearly "yes." She made a valid will, and even though that will be still unprobated, it was, and indeed still is, capable of giving effect to her intentions. That proposition

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has not been disputed. Thus she did not die intestate, and it appears to me to follow that any claim by an heir who would succeed upon an intestacy must necessarily fail.

So far as I can see, the only way in which the plaintiff could surmount this difficulty would be by showing that the will could not be established against him, in which case the Court would have to infer an intestacy. Recourse for this purpose has been had to S. 187. This section provides that "Na right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction (in British India) shall have granted probate of the will under which the right is claimed." Clearly this does not amount to saying that a will may not be proved for any purpose otherwise than by producing probate, but only for the purpose of establishing a right as executor or legatee. But it is argued for the plaintiff that title to the property must vest in some one, that *prima facie* it vests in him, that only by proof of a superior title can his title be displaced, and that this section renders such proof inadmissible. His title must therefore prevail.

I would meet this argument by saying that for the defendant to prove title in himself is not indispensable. He may plead, "I may not be able to prove my own title, but it will do if I show that title cannot vest in you, and to do this I have simply to establish the will." I cannot see that the plaintiff has any answer to this form of defence if, as I am disposed to hold, his claim fails upon an adjudication against him upon the issue of intestacy. Once the intestacy has been found against, the plaintiff has no better claim than anyone else to oust the defendant, however infirm or incapable of proof may be her title, and upon this view it would be immaterial whether the defendant was (or represented) an executor or legatee, or was a mere third party or trespasser.

To hold that the intestacy could not be disproved by establishing the unprobated will would be to give S. 187 an effect similar to that of S. 49 of the Registration Act, according to which a document required to be registered, and which is unregistered, cannot be received in evidence. If that had been intended, I do not see why it was not expressed. It may then be said that the construction which I put upon the statute would lead to very inconvenient results. The argument, of course, cannot avail if, as I am compelled to find, the statute is clear. No doubt there may be cases in which an executor who fails to obtain probate causes loss and trouble to others. There

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being no period of limitation, it is possible for him to postpone indefinitely the settlement of claims upon the estate. On the other hand, the position would hardly be more satisfactory if, as in a case like the present, the testator's wishes could be rendered ineffectual by a mere omission to probate a perfectly good will.

I have not thought it necessary to discuss the case-law, as the learned Judge has already done so, and as we have decided to refer the question to a Full Bench. I agree to the terms of the reference proposed.

K. S. Krishnaswami Aiyangar and *K. Bhashyam Aiyangar* for appellant.

C. Venkatasubramiah for respondent.

The Court expressed the following

Sir William Phillips, O. C. J.

OPINION :—*The Officiating Chief Justice* :—The question referred to us is: Can a defendant resisting a claim made by the plaintiff as heir-at-law rely in defence on a will executed in his favour at Madras in respect of property situate in Madras when the will is not probated and no letters of administration with the will annexed have been granted?

This question deals with the provisions of S. 187 of the Indian Succession Act, X of 1865, which is to the effect that no right as legatee can be proved by a will of which probate has not been taken. It has been held by this Court in *Caralapathi Chinna Cunniah* v. *Cota Nammalwariah* (3) that this objecttion to proving by an unprobated will applies only to a plaintiff and it was held "that a defendant is not precluded by that section from relying upon a will as he is not seeking to establish a right as executor or legatee." *Janaki* v. *Dhanu Lall* (2) was cited as authority for that proposition. On a reference to *Janaki* v. *Dhanu Lall* (2), with all respect, it seems very doubtful whether any such proposition is there put forward. In that case the 1st defendant had obtained a decree against the personal representatives of the deceased man who was said to have left a will, and subsequently the deceased's mother, who would have been his representative in the absence of a will, brought a suit to set aside that decree. It was then held that, "though the executors can establish no right without taking probate, the existence of the will cannot be ignored for all purposes whatsoever." It was also observed "that the decision in

2. (1891) I L R 14 M 454. 3. (1909) I L R 33 M 91.

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Prosunno Chunder Bhuttacharjee v. *Kristo Chytunno Pal* (6) is applicable, and that the persons, who took possession of Gulab's estate upon his death, were liable to be treated by the creditor (1st defendant) as his representatives even though themselves liable to be dispossessed by the executors on taking out probate." It was, therefore, held that the 1st defendant's decree was not a nullity and it was open to him to prove that Ghulab left a will and, therefore, the plaintiff was not a person who could claim to set that decree aside. It was clearly in the minds of the Judges that the executors could establish no right without taking probate, and yet the existence of the will was in the circumstances allowed to be proved. That is not authority for the proposition that a defendant is not precluded from establishing a right under an unprobated will, as was held in *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah* (3). I am strengthened in this view by the fact that *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (6) was relied upon by the learned Judges in *Janaki* v. *Dhanu Lall* (2). In that case no question was decided under S. 187 of the Succession Act. It was merely held that a decree having been obtained against the *de facto* manager of the deceased's estate, the decree was not a nullity and, even if it cannot be executed against the estate in the hands of the executors when he has taken out probate, it is at any rate sufficient to enable the plaintiff to bring a suit against the executor in order to have the decree satisfied. In fact, the executor had actually obtained probate.

There is nothing in S. 187 which would in terms make it applicable only to the case of plaintiffs and not to the case of defendants, and this view has been taken in several cases, in opposition to *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah* (3). The first of these is *Lakshmamma* v. *Ratnamma* (5) where, however, *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah* (3) does not appear to have been cited. Again in *Parthasarathy Aiyar* v. *Subbaroya Gramany* (4), *Kumar Chandra Kishore Roy* v. *Prasanna Kumar Dasi* (7) and *Basunta Kumar* v. *Gopal* (8) no distinction is drawn between a plaintiff and a defendant. There is, however, a remark of Schwabe, C. J., in *Parthasarathy Aiyar* v. *Subbaroya Gramany* (4)

2. (1891) I L R 14 M 454. 3. (1909) I L R 33 M 91.
4. (1923) 45 M L J 175. 5. (1913) I L R 38 M 474 : 25 M L J 556.
6. (1878) I L R 4 C 342. 7. (1910) 21 M L J 116.
8. (1914) 18 C W N 1136.

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who, after stating "that a person who in Court has to prove title and has to deduce that title from a will, whether that person is plaintiff or defendant, cannot do so without producing probate," goes on to remark, "This would not prevent a defendant resisting a claim by an heir-at-law by producing and proving a will of which probate had not been granted." This observation must clearly be read as being limited to cases in which the claim could be resisted without establishing a title under the will. This view has been taken consistently throughout and it is evident that there can be no objection to an unprobated will being proved for certain limited purposes, provided that it is not sought to prove by the will a right thereunder; for this is prohibited by S. 187.

The answer, therefore, to the question referred to us must be that a defendant can rely on an uprobated will, provided that he does not do so in order to establish a right under the will.

As this answer will in no wise dispose definitely of the case before the referring Judges, I think I may add a few words on the facts of the case. The plaintiff is suing as heir-at-law, but he was resisted by the defendants who claim under a will of which no probate has been taken. It is argued that it is a sufficient answer to the plaintiff's case to allege and prove the existence of a will; for in that case the plaintiff, who would be the heir in case of intestacy, would no longer have any right. This rather ignores one point which, I think, is important, namely, that the plaintiff being the heir under intestacy, which must be presumed until a will is proved, is entitled to succeed to the property, unless it can be shown that his title has been displaced. If the defendant merely proves that a will is in existence and does not prove the terms of that will, that is not necessarily inconsistent with the plaintiff's title. In the first place, the will may not be a valid will and, in the second place, the plaintiff may be a legatee under the will. The mere existence, therefore, of a will does not necessarily displace the plaintiff's title. It is necessary for the defendant to go further and to prove that some one other than the plaintiff has title under the will. This he cannot do by virtue of the provisions of S. 187. In the circumstances of the present case, I would therefore hold that the defendant cannot use an unprobated will as a defence.

Beasley, J.

Beasley, J. :—I agree.

Ananthakrishna Aiyar, J.

Anantakrishna Aiyar, J.—I agree. An argument based on the principle of the plea of *Jus tertii* was advanced on

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behalf of the respondent on which I should like to say a few words. I find the principle of *Jus tertii* referred to in Odgers' book on Principles of Pleading and Practice, Chapter VIII, p. 139, Ninth Edition: "If the plaintiff is in possession of any land or goods or can otherwise make out a *prima facie* title to them, it is not enough for the defendant to show a better title in some third person; he must also show that he acted as agent for such third person at the time he did the act complained of." Thus where a plaintiff makes out a *prima facie* title in him to the property in dispute, the defendant has to show a better title either in himself or in some third person. If what is stated above be the correct principle of pleading applicable to such cases, it follows that when the plaintiff in the present case shows a *prima facie* title in himself to the property in dispute—as the admitted heir-at-law of the last owner—the defendant has 'to show a *better* title' either in himself or in some third person (in the words of the learned author quoted above) or "establish a right as legattee" (in the language of S. 213 of the Indian Succession Act, XXXIX of 1925) in himself or in some third person. It seems to me therefore that where the plaintiff's *prima facie* title to the property is established, the defendant in order to nonsuit the plaintiff should establish the title of the legatee. The general law would seem to be that the defendant's plea of *Jus tertii* cannot be entertained when he does not state in whom (such) the right resides. The defendant must trace the title to a third party other than plainitff. A mere suggestion that there may be a third party with better title is nothing (*Chandra Kanta Pathak* v. *Bhagjur Bepari* (9). It has been held by the Privy Council that "possession is a good title against all the world except the person who can show a better title"—*Sundar* v. *Parbati* (10); *Narayana Rao* v. *Dharmachar* (11). Similarly a *prima facie* title made out by the plaintiff to the property in suit is, I think, a good title against all the world except against the person who can show a better title. This *prima facie* title of the plaintiff has no doubt to be proved by him if it be not admitted by the defendant; but when once plaintiff's *prima facie* title is admitted or proved, I think it follows that he must succeed unless the defendant is able to displace the plaintiff's *prima facie* title and prove a better title in some person other than the

9. (1909) 1 I C 525.
10. (1889) L R 16 I A 186 : I L R 12 All. 51 at 56 (P C).
11. (1902) I L R 26 M 514 at 517.

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plaintiff. If such person's rights should happen to be as legatee under a will, since the defendant has to prove such person's rights as legatee, he comes within the scope of S. 213 of the Succession Act, XXXIX of 1925 (S. 187 of the old Act X of 1865) under which "No right as legatee can be established in any Court of Justice, unless a Court of competent jurisdiction has granted probate of the will under which the right is claimed". We are not here concerned with that class of cases where no directe title to property is claimed under a will,—the will being relied on only to prove an authority to adopt or as containing an admission of the status of some other person—*Achyutananda Das* v. *Jagannath Das* (12); *Manuel Louis Kunha* v. *Juana Coelho* (13); *Basunta Kumar* v. *Gopal* (8).

My Lord, the learned Officiating Chief Justice, has in his judgment discussed the trend of decisions in this Court on the construction of the section. I think that the respondent in the present case has to establish the right of the deceased Saraswathi Bai as legatee of the suit property to displace the *prima facie* title of the appellant and under S. 213 of the present Act (S. 187 of old Act) she is not entitled to do so unless a Court of competent jurisdiction has granted probate of the will under which the right is claimed. I would accordingly answer the question referred to us in the negative, and hold that the defendant in the present case cannot use the unprobated will as a defence to the suit.

N. S. *Reference answered in the negative.*

FULL BENCH.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—THE HON'BLE SIR WILLIAM PHILLIPS, *Officiating Chief Justice*, MR. JUSTICE RAMESAM AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax, Madras ... *Referring Officer.**

v.

Mohideen Sahib of Bellary ... *Assessee.*

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Indian Income-tax Act (XI of 1922), S. 3—Body of individuals taking in auction, working and sharing the profits from toddy shops—If can be assessed on the combined profits of the shops.

*R. C. No. 21 of 1925. 6th September, 1927.

8. (1914) 18 C W N 1136.
12. (1914) 20 C W N 122.
13. (1908) I L R 31 M 187 : 18 M L J 158.

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A body of individuals who have agreed to take in auction, work and share the profits from four toddy shops can be taxed under S. 3 of the Income-tax Act on the combined profits of the four shops.

Case stated by the Commissioner of Income-tax, Madras, in his reference to the High Court, dated 21st October, 1925, under S. 66 (2) of the Income-tax Act:

ORDER OF REFERENCE

Under S. 66 (2) of the Indian Income-tax Act, XI of 1922, I have the honour to refer the following question of law for the decision of the Hon'ble the Judges of the High Court:—

"Whether a body of individuals who have agreed to take in auction, work and share the profits from four toddy shops can be taxed, under S. 3 of the Indian Income-tax Act, on the combined profits of the four shops."

2. The facts of this case are as follows: For some time there has existed in Bellary district an association of individuals who have habitually secured control over certain toddy shops. The toddy shops in question are Adoni shops Nos. I, II and III and Basapuram shop. This association at the annual auction sales has taken the lease of these shops in the names of various individuals and has then arranged to finance the working of the shops and to divide the profits therefrom. The members of the association for the lease ending 30th September 1922 were:

			Share.
1.	Roshan Chinna Manulla Hussain Sahib, Adoni	...	0 2 6
2.	N. Ragavendra Rao, Adoni	...	0 2 6
3.	Ediga Dariappa, Adoni	...	0 2 3
4.	Nakhate Narayana Rao, Adoni	...	0 0 6
5.	Ediga Pesalakanda Narasingappa	...	0 0 3
6.	Mohideen Sahib, Bellary,		
"	J. Mariappa		
"	K. Basappa		0 8 0
	Balasundara Mudaliar, Adoni		
	Bada Batcha Sahib, Bellary		

In that year Adoni Toddy Shop No. I was taken in the name of K. Basappa, Shop No. II in the name of Arumuga Mudaliar, Shop No. III in the name of N. Ragavendra Rao and Basapuram Shop in the name of Kuppuswami Naicker. For the year ending 30th September, 1923, the account year now in question, the members of the partnership were:—

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1.	Roshan Chinna Manulla Hussain Sahib	0-1-9¾
2.	N. Ragavendra Rao	0-1-9¾
3.	Ediga Dariappa	0-1-9¾
4.	Nakhate Narayana Rao, Adoni	0-0-6
5.	Ediga Pesalakanda Narasingappa	0-0-3
6.	G. Aiyappa	0-1-9¼
7.	D. Mohideen Sahib and others of Bellary	0-8-0

In this year the association took the shops as follows:—

Adoni town shop No. 1 in the name of N. Narayana Rao, No. II in the name of Bagala Ganga Reddi, No. III in the name of Dabbara Seshappa and the Basapuram shop in the name of Narasayya. Partner No. I, Roshan Chinna Manulla Hussain Sahib, stood surety for the kists due on Adoni shop No. II. Adoni shop No. III was after the sale formally transferred to the name of Mohideen Sahib. Common accounts were maintained for the partnership and were actually produced in connection with a proposed assessment of the association in the year 1923-24. They were withheld during the assessment proceedings of the year under dispute, *i. e.*, 1924-25, though there is clear evidence that they did exist. In the year 1923-24 the Collector proposed to tax the combine on the total profits made from the shops. The existence of the combine was then admitted by several of its members and the accounts relating to its working were produced but on the representation of the pleaders for the individuals who had formed the combine that there could not be a legal partnership under the Abkari Act, the Collector dropped his proposal to make a joint assessment in that year and confined himself to assessing the profits made by the individual members of the combine. In 1924-25 the Collector came to the conclusion that this former view had been wrong and issued a notice to the members of the combine proposing a joint assessment. In his assessment order (appended marked A) he has detailed the reasons which led him to believe the existence of the combine. I have confirmed this finding of fact on appeal. Relying on the statement by one of the partners N. Narayana Rao that from his share of half an anna he had obtained Rs. 1,408 and relying also on the accounts of the Abkari department the Collector estimated the profits of the combine at Rs. 50,000 and assessed it accordingly. Petitions under S. 27 were filed before the Income-tax Officer and an appeal was then filed before me. After hearing the pleaders for the assessees I held that the existence of the association had

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been proved and that its profits were legally liable to taxation. D. Mohideen Sahib having put in an application under S.66(2), I refer the question of law set out in paragraph (1) for the opinion of the High Court.

3. It was argued before me during the appeal and the application for a reference that a firm or association which has agreed to divide the profits from toddy shops, which had not been leased to the firm or association as such, was illegal, as it contravened the provisions of R. 27 of the general conditions applicable to all abkari and opium licenses. Various decisions were quoted in support of this view, viz., *Ayyadorai Pillai* v. *Solai Ammal* (1), *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (2) and *Nalain Padmanabham* v. *Sait Badrinadh Sarda* (3).

R. 27 of the general conditions reads "no privilege of supply or vend shall be sold, transferred, or sub-rented without the Collector's previous permission nor, if the Collector so orders, shall any agent be appointed for the management of any such privilege without his approval". The second part of this rule is inapplicable to the present case because the Collector of Bellary has not issued any orders to the effect that an agent shall not be appointed in toddy shops in the Bellary district. I take it that the law as laid down in the Madras decisions quoted above is final, but in my opinion the legality or illegality of the agreement under which the profits of the four toddy shops are shared has no bearing on the question of the liability of the association to income-tax. The Indian Income-tax Act is concerned only with the taxation of profits, however they are made, irrespective of the question whether the transaction or transactions, out of which the profit arises, are such as to give rise to valid mutual rights and obligations between the parties thereto. The fact that the agreement between the partners of this firm or the members of this association cannot be enforced in a Court of law seems to me to supply no reason why the firm or the association should not pay its share of the profits of the business to the Crown. I am therefore of opinion that the question referred should be answered in the affirmative.

M. Patanjali Sastri for Referring officer.

T. R. Ramachandra Aiyar for Assessee.

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1. (1901) I L R 24 M 405. 2. (1902) I L R 26 M 410.
3. (1911) I L R 35 M 582 : 21 M L J 425.

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Sir William Phillips, O. C. J.

The judgment of the Court was delivered by

The Officiating Chief Justice :—The question referred is, "whether a body of individuals who have agreed to take in auction, work and share the profits from four toddy shops can be taxed under S. 3 of the Income-tax Act on the combined profits of the four shops".

The Income-tax Commissioner finds that there was a body of seven persons who formed a sort of partnership. Of these seven persons, four bid and obtained leases of four toddy shops, and the profits from those four toddy shops were shared between the seven persons; apparently also all the seven assisted in the working and financing of those shops. On this finding he holds that this association of persons was not an illegal association under the Abkari Rules. Here the petitioner's vakil questions that finding and contends that his client and others have offended against the law in that they have contravened the provisions of R. 27 of the general conditions of those licenses, *viz.*, "No privilege of supply or vend shall be sold, tranferred or subrented without the Collector's previous permission". There is no evidence that the license-holders have either sold, transferred or sub-rented the shops which they have taken on lease. It is not, therefore, apparent how that rule has been contravened and, certainly, we cannot presume illegality, in the absence of any evidence of such illegality.

The answer, therefore, to the question must be in the affirmative. Costs, including counsel's fee Rs. 250, to be paid by the petitioner.

N. S. *Reference answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Vanu Ramachandriah ... *Petitioner* (Accused).*

Ramachandriah, *In re.*

Indian Penal Code, Ss. 116 *and* 161—*Scope of—Manager of a Municipality—Offer by a Councillor of illegal gratification to the manager to procure a contract for another—Manager to use his influence with Chairman and the Councillors—If guilty of offence—Actual production of the gratification if necessary—Offer not accepted by the person to whom it was made—Effect.*

Where the giving of the contract for a lock-up shed in a Municipality lay with the Chairman and the Councillors and a Municipal Councillor wrote to the manager of the Municipality as follows: "The matter regarding

*Cl. R C No. 110 of 1927. 4th May, 1927.
(Cl. R P No. 100 of 1927).

Ramachandriah, In re.

the lock-up shed, Mr. Manicka Seshayya is keen about it. Will you just try that job for him? I now here take my full privilege to you to say that he makes an offer of Rupees two hundred to you in case he gets it. I shall stand surety for it if you can interfere in the matter and have it settled. If you can assure me he is prepared to deposit the amount."

Held, that this amounted to an offer by the Councillor of an illegal gratification to the manager to use the influence he possessed in such capacity over the Chairman and the Councillors to procure the Municipal contract for Manicka Seshayya, and did not merely pass on the offer by Manicka Seshayya himself.

Emperor v. *Amir-ud-din*, 24 Bom. L R 534, *Venkiah*, In re., 47 M L J 662, distinguished.

S. 161 of the Indian Penal Code is not confined to cases in which the illegal gratification is taken for doing an official act but also applies to a case where a public servant accepts the illegal gratification as a motive or reward for rendering or attempting to render any service to any one with any public servant as such.

For the applicability of S. 161 of the Indian Penal Code it is not necessary that the illegal gratification should have actually been produced, it is enough if a firm offer to pay the amount was made.

A person who offers an illegal gratification is guilty of an offence under S. 116 of the Indian Penal Code although the person to whom the offer was made has not accepted it.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of North Arcot at Vellore in Criminal Appeal No. 24 of 1926 (C. C. No. 17 of 1926 on the file of the Court of the Sub-divisional Magistrate of Ranipet).

V. L. Ethiraj and *A. S. Sivakaminatham* for petitioner.

Public Prosecutor for the Crown.

The Court made the following

ORDER :—The petitioner has been convicted of an offence under S. 161 of the Indian Penal Code read with S. 116. His contention is that on the facts found the offence has not been established.

The facts found are that on 15th November, 1925, he, a Municipal Councillor of the Wallajapet Municipal Council, did, in a letter written to the complainant, who was the manager of the office of the same Municipality, say to him, "The matter regarding the lock-up shed, Mr. Manicka Seshayya is keen about it. Will you just try that job for him? I now here take my full privelege to you to say that he makes an offer of rupees two hundred to you in case he gets it. I shall stand surety for it if you can interfere in the matter and have it settled. If you can assure me, he is prepared to deposit the

Ramachandriah, *In re.*

amount". The giving of a contract for this lock-up shed lay with the Chairman and the Councillors. I have no doubt what this letter means. The petitioner informs the manager that if he uses his influence with the Chairman and Councillors to secure the contract for Manicka Seshayya, he will get Rs. 200 from Manicka Seshayya or, if not from him, then from himself, the petitioner. That is, in effect he says, "I, at any rate, will see that you get Rs. 200 if you get the contract for Manicka Seshayya". That is equivalent to an offer of Rs. 200 if he gets the contract for him. I am not able to support the contention that this is a merely passing on of an offer by Manicka Seshayya himself. It is clearly an undertaking by the petitioner himself that he will, if necessary, pay this Rs. 200 when the contract is obtained. I am clear therefore that this is an offer by the petitioner of an illegal gratification to the complainant in his capacity as manager of the Municipal Office, to use the influence he possesses in such capacity over the Chairman and Councillors in order to procure this Municipal contract for Manicka Seshayya.

It is next contended that even so petitioner's conduct does not amount to an abetment of an offence under S. 161, first because even if complainant had accepted the bribe he would not have committed an offence under that section and therefore there cannot be any abetment of such an offence, secondly that petitioner's conduct did not amount to a real offer and thirdly that at the most his conduct amounted to a mere abetment of an attempt or an instigation of an abetment. He further raised the question whether the complainant is a public servant. That point however was never raised in the Courts below where it was not disputed that he was a public servant. Whether he is or is not is a question of fact and I am not prepared to let it be raised here for the first time and I take it that the complainant is a public servant.

The essence of the first contention is that the complainant was not asked to do an official act since officially he has nothing to do with such a contract, but S. 161 is not confined to cases in which the gratification is taken for doing an official act. The wording of the section is clumsy, but it does not appear to me to be so restricted. From that wording and omitting words which are superflous for this argument it is an offence if a public servant accepts any gratification other than legal remuneration as a motive or reward for rendering or attempting to render any service to any one with any public

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servant as such. Now here on the facts if the complainant, the manager of the Municipal Office and a public servant, had accepted the Rs. 200 as a reward for using his influence with the Chairman and the Councillors as such to get a contract for Manicka Seshayya, which contract was in the gift of the Chairman and Councillors as such, I have no doubt that he would be guilty under S. 161, whether or not the act which he did was an official act. Incidentally I can see no reason for supposing that what the Chairman and Councillors as a body do or can do officially they do not do as a public servant.

As to the second contention, it is not necessary that the gratification need actually be produced. I have already held that petitioner was obviously making a firm offer to pay the complainant Rs. 200 if Manicka Seshayya got the contract through his good services. As to the third contention, the petitioner offered the gratification and although the complainant did not accept it, petitioner would still be guilty under S. 116. See illustration (*a*) to that section. That illustration no doubt deals with an offer for a bribe to a public servant for showing favour in the exercise of his *official* functions. But the principle of the illustration obviously applies as much to the other purposes set out in S. 161 as to doing or forbearing to do any official act.

It is pleaded that the charge framed was obscure, but so far from that being the case, it seems to me to set out clearly the exact conduct contemplated in the latter part of S. 161 so as to bring the abetment by the petitioner under S. 116. The charge runs that "You offered illegal gratification of Rs. 200 to Rajam Aiyar, manager, Municipal Office, Wallajapet, as a motive or reward for rendering a service to Manicka Seshayya with the Chairman and Councillors, to wit, to procure for Manicka Seshayya the contract of a lock-up shed". It has been quite clearly framed with an eye to that part of S. 161 which is applicable to the case.

Petitioner calls in aid a ruling of a Bench of the Bombay High Court reported in *Emperor* v. *Amir-ud-din* (1), but there, as will be seen, there was no offer by the accused himself. He merely stated that some one else was willing to bribe. In the present case the petitioner himself made an offer in what he guaranteed the money if the favour was granted. The case in *Upendranath Chowdhury* v. *The King-Emperor* (2)

1. (1922) 24 Bom. L R 534. 2. (1916) 21 C W N 552.

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is distinguishable on the ground that the money taken there was not for rendering service with any pubic servant as such. The case in *Venkiah, In re,* (3) has been relied upon. But there the facts again do not show that the kurnam took the money for rendering a service with any public servant as such and therefore the conviction could not stand unless it was proved that he took it for doing an official act, which was held not proved on the facts. None of these cases therefore are of any assistance to the petitioner. I therefore do not see that any error of law has been committed by the Lower Courts and the conviction is proper and must stand.

I am asked to reduce the sentence, but having regard to the necessity for severely punishing attempts to foul the purity of official administration, I am not prepared to interfere. I therefore dismiss this petition.

N. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE CURGENVEN.

L. Krishnaswami Naidu and another ... *Appellants** (*Appellant in S. A.* 1518 *of* 1923 *on the file of the High Court and nil*).

v.

Sriram Sriramulu Naidu ... *Respondent* (*Respondent in do*).

Krishnaswami Naidu *v.* Sriramulu Naidu.

Civil Procedure Code, S. 102—*Suit of nature cognisable by a Court of Small Causes—Shrotriamdar—Melwaram and Swatantram payable by tenant—Suit for recovery of—Second Appeal in—Provincial Small Cause Courts Act, Sch. II, Art.* 13—*Payments of money contemplated by—Swatantrams if.*

A suit by a Shrotriamdar to recover melwaram and swatantrams from his tenant is a suit of a nature cognizable by a Court of Small Causes within the meaning of S. 102 of the Civil Procedure Code.

Art. 13 of Sch. II to the Provincial Small Causes Courts Act, relates only to payments of money due to a person in consideration of his interest in immoveable property. Swantantrams payable to a Shrotriamdar by his tenants are not such payments.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Spencer, dated 8th January, 1926, and passed in S. A. No. 1518 of 1923, preferred to the High Court against the decree of the District Court of

*L. P. A. No. 98 of 1926. *29th July, 1927.

3. (1924) 47 M L J 662.

Krishnaswami Naidu v. Sriramulu Naidu.

Chingleput in A. S. No. 179 of 1922 preferred against the decree of the Court of the Principal District Munsif of Chingleput in O. S. No. 936 of 1919.

L. S. Veeraraghava Aiyar and *A. Ramakrishna Aiyar* for appellants.

A. V. Viswanadha Sastri for respondent.

The judgment of the Court was delivered by

Curgenven, J.

Curgenven, J. :—This Letters Patent Appeal is from the judgment of Spencer, J., in S. A. No. 1518 of 1923, dismissing the Second Appeal on the ground that under S. 102, Civil Procedure Code, no such appeal lay, inasmuch as the suit was of a nature cognizable by a Court of Small Causes and the value of the subject matter did not exceed Rs. 500. The suit, which was valued at Rs. 354, was brought by a *shrotriamdar* to recover *melwaram* and *swatantarams* from his tenant. *Melwaram*, it is not disputed, is rent, and, under Art. 8 of the second schedule of the Provincial Small Causes Courts Act, a suit for rent is cognizable by a Court of Small Causes which has been expressly invested with the power to try such a suit. All Subordinate Judges and District Munsifs within the Madras Presidency have been invested with powers to try rent suits upon the Small Cause Side, provided that they fall within the pecuniary limits of their Small Cause jurisdiction, so that the effect of this article, read with the empowering notification, is to exclude all such rent suits from the second schedule and to make them cognizable by a Small Cause Court. In other words, the effect of the notification is to delete Art. 8 from the schedule, and it only remains to inquire therefore whether, by reason of the circumstance that the claim to *Swatantarams* can be brought under any other article of the schedule, the suit for *melwaram* and *swatantarams* was of a nature not cognizable by a Small Cause Court.

The only article which requires consideration is No. 13, which excludes 'suit to enforce payment of the allowance or fees respectively called *Malikana* and *Haqq* or of cesses or other dues when the cesses or dues are payable to a person by reason of his interest in immoveable property or in an heriditary office or, in a shrine or other religious institution.' It has been suggested to us that a *swatantaram* is a cess payable to a person by reason of his interest in immoveable property, namely, to the *shrotriamdar* whose interest in the land in respect of which this cess is payable is that of landlord. It is not disputed that a *swatantaram* is a contribution, collected in this instance at least,

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by the landlord, towards the cost of the village-agency. If authority be required for this view of the nature of the payment, it is to be found in *Vadamalai Thiruvanatha Sevuga Pandia Thevar* v. *Sankaramurthi Naidu* (1), but the point is conceeded. It is for consideration, therefore, whether a cess which the land owner collects, but collects for disbursement of the proceeds to the village servants, and not for his own benefit, can be deemed to be payable to him 'by reason of his interest in immoveable property'.

The case *Maharaja of Visianagaram* v. *Veeranna* (2), which is the only case cited to us under this article, related to the recovery of land cess from an inamdar by a zamindar, and although that is not a parallel case, we may quote with approval, the opinion, which the judgment contains, that "the cesses and dues contemplated in Art. 13 are payments which a person is entitled to as representing his interest in certain immoveable property, and not because he possesses some interest in immoveable property".

We think it is clear that the words "by reason of his interest" confine the cesses or other dues contemplated by the article to payments to be made to a person claiming to be entitled to them by reason of his interest in the immoveable property, and that they operate to exclude payments to which a landholder receives not for his personal benefit but for some public or communal purpose. Although no doubt it is customary and convenient that the land-owner should collect the *Swatantarams*, yet he only does so as the administrator of a fund created for a special purpose, and it would be possible to make arrangements for collecting the money without his instrumentality. We think that the article relates only to payments of money due to a person in consideration of his interest in the property, and that accordingly *swatantarams* do not fall within its scope.

We agree therefore with the learned Judge that the suit was of a nature cognizable by a Small Cause Court and that no second appeal lay. The Letters Patent Appeal is dismissed with costs.

A. S. V. *Appeal dismissed.*

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1. (1918) I L R 42 M 197 : 36 M L J 109.
2. (1911) I L R 36 M 18 : 21 M L J 819.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER AND MR. JUSTICE MADHAVAN NAIR.

Mankada Kovilagath Rao Bahadur Krishna Varma *alias* Valia Raja Avergal ... *Appellant** (*Claimant*)

v.

Official Receiver, South Malabar, Calicut ... *Respondent* (*Respondent*).

Valla Raja *v.* Official Reciver, South Malabar, Calicut.

Deed—Construction—Charge on immoveable property.

By the rules of a Kuri a subscriber who took a prize was to furnish security for the payment of future subscriptions. The subscribers who took a price executed a bond to the stake holder which was stamped as if it was a mortgage. The bond contained a clause that the excutants undertake, when required by the stakeholder, to give him a mortgage on the property. But there was another clause which was added to the deed as a sort of supplement before it was signed by the executants. This clause ran as follows: "We and the properties are liable for any arrears of future subscription mentioned above."

Held, that the supplementary clause was as much part of the completed deed as the undrtaking to give a mortgage when required and the intention of the executants was to create a charge on the properties.

The United Realisation Co. Ltd. v. *The Commissioners of Inland Revenue,* (1899) 1 Q B D 361, referred to.

Appeal against the order of the District Court of South Malabar at Calicut, dated 17th February, 1925, in C. M. A. No. 125 of 1924, preferred against the order of the Court of the Official Receiver of South Malabar at Calicut, dated 21st November, 1924, in M. P. No. 62 of 1924 in I. P. No. 25 of 1923 on the file of the District Court.

C. Unikanda Menon for appellant.

T. S. Anantaraman for respondent.

The court delivered the following

JUDGMENT :—The only question in this appeal is whether the bond executed by the insolvents on 26th July 1911 created a charge on the immoveable property. They subscribed for half a ticket in a Kuri and took a prize of Rs. 10,000. By the rules of the Kuri a subscriber who took a prize was to furnish security for the payment of future subscriptions and it is significant that the bond given by the insolvents was stamped as if it was a mortgage. It seems to us clear that the intention of the parties was to create a charge. The respondent relied on two features

* C M A No. 388 of 1925. 5th May, 1927.

Valla Raja Avergal v. Official Reciver, South Malabar, Calicut.

of the deed. The first is that the insolvents undertook, when required by the stake-holder, to give him a mortgage on the property. The second is that the clauses on which the appellant relies were added to the deed as a sort of supplement, though before it was signed by the insolvents.

The first point would undoubtedly be conclusive in favour of the respondent, were it not for the supplementary clause. That clause runs " We and the properties mentioned in the afore said partition deed are liable for any arrears of future subscription mentioned above. The properties in A and B schedules of the said partition deed are situated in Purayiri Amsom, Kannadi Amsom, included in Koyalmannan District and Kallutikode Amsom comprised in Mannarkat sub-district". We attach no significance to the fact that it is a supplementary clause. It is as much part of the completed deed as the undertaking to give a mortgage when required and we see no reason why it should not be given effect to, if it creates a charge. A number of decisions have been cited before us. That most in point seems to be *United Realisation Company* v. *Inland Revenue Commissioner* (1). Wills, J. said "It is plain, I think, from the cases to which the Solicitor-General called our attention, that the introduuction into an instrument of a provision that a demand or request shall be one of the preliminaries to the obligation to execute a deed does not determine the question whether the instrument creates a present charge or not. That question is to be decided upon perfectly different considerations. If an intention to give a present charge can be collected from the instrument, the introduction of such a provision does not make it less a present charge." As we have already observed, we are satisfied that the intention here was to create a present charge. The rule of the Kuri was that security should be furnished for future subscriptions and the document was stamped as if it was a mortgage.

The appeal is allowed with costs throughout. Costs to come out of the Estate.

N. S. *Appeal allowed.*

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1. (1899) L R 1 Q B D 361.

Abbas Ali Sahib, *In re.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLER AND MR. JUSTICE MADHAVAN NAIR.

Abbas Ali Sahib and another ... *Petrs.** (*Accused 3 and* 1).

Penal Code, S 391—Dacoity—Three known and named persons together with two unknown men charged with—Acquital of one of the known and named men—Finding that the other two are guilty of dacoity—Legality—Duty of Judge to ask jury expressly whether they still considered number of robbers to be five—Omission to so ask—Effect.

Three known and named persons were charged with dacoity along with two other unknown men. The jury acquitted one of the three and convicted the other two of the offence of dacoity.

Held, that it was quite open to the Jury, while holding that one of the accused who was supposed to have been known to the witnesses had not been properly identified, to find that the total number of dacoits was five.

Held, however, that when the jury acquitted the 2nd accused, the Judge should have asked them definitely whether they had considered the possible result of the acquittal and whether they still found that the number of robbers was five as, if they did not, the remaining accused would have been found guilty only of robbery.

Conviction accordingly set aside.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of the Madura Division in Criminal Appeals Nos. 2 and 7 of 1927 preferred against the judgment of the Court of Assistant Sessions Judge of Madura in S. C. S. No. 88 of 1926.

F. S. Vas for petitioners.

The Public Prosecutor for the Crown.

The Court made the following

ORDER :—The main question raised is this. Three known and named persons were charged with dacoity along with two other unknown men. The jury acquitted one of the three and convicted the other two of the offence with which they had been charged. Mr. Vaz argues that the conviction is illegal as the jury has no jurisdiction to substitute for a man known and named one who was unknown. We are not prepared to go that length. We think that it was quite open to the jury, while holding that one of the accused who was supposed to have been known to the witnesses had not been properly indentified, to find that the total number of dacoits was five. At the same

*Crl. R. C. No. 187 of 1927. 4th May, 1927.
(Crl. R. P. No. 168 of 1927).

time we are of opinion that, when they acquitted the 2nd accused, the Judge should have asked them definitely whether they had considered the possible result of the acquittal and whether they still found that the number of robbers was five. Nothing of the sort was, however, done and it is impossible to say what the finding of the jury would have been had those questions been put to them. It is not at all unlikely that the petitioners before us would have been found guilty only of robbery and received much lighter sentences. Abbas Ali Sahib, *In re.*

The convictions must be set aside. We, however, see no necessity to direct a retrial. The petitioners have been in jail for several months, a quite adequate punishment for what appears to have been no more than a drunken brawl. The petitioners will be released from custody.

A. S. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS AND MR. JUSTICE MADHAVAN NAIR.

Tirumala Venkata Reddy and others ... *Accused** 1 *to* 11 *in C. C. No.* 14 of 1926 *on the file of the Sub-divisional Magistrate of Narasappur.*

v.

Sikatapu Ramayya ... *Complainant in— do—*

Criminal Procedure Code, S. 408—Magistrate having second class powers—Trial by—Magistrate getting first class powers pending the trial—Conviction—Appeal to District Magistrate—Jurisdiction to hear appeal.

Venkata Reddy *v.* Ramayya.

A Criminal case was tried by a Magistrate who had second class powers. The trial was continued by him after he got first class powers, the case having been re-numbered. He convicted the accused and an appeal was preferred to the District Magistrate who quashed the conviction holding that the case was not made out.

Held, (on reference by the Sessions Judge) that, under S. 408 of the Criminal Procedure Code, only a Court of Session can hear the appeal and the District Magistrate had no jurisdiction to hear it.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code by the Sessions Judge of West Godavari Division in his letter Dis-I Sessions-I 3rd January, 1927, dated 23rd December, 1926.

P. V. Vallabacharyulu for accused.

Public Prosecutor for Crown.

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* Crl. R. C. No. 47 of 1927. 28th March, 1927.
(Case Referred No. 5 of 1927).

Venkata Reddy v. Ramayya.

Devadoss, J.

The judgment of the Court was delivered by

Devadoss, J. :—This is a reference by the Sessions Judge of West Godavari Division. The case was tried by a Magistrote who had second class powers and the trial was continued by him after he got 1st class powers. The case was re-numbered after he got 1st class powers. He convicted the accused and an appeal against this conviction was preferred to the District Magistrate who quashed the conviction holding that the case against the accused was not made out. The question is whether the District Magistrate had jurisdiction to hear an appeal from the decision of a 1st class Magistrate. The District Magistrate seems to justify his action on the ground that the trial was started by a second class Magistrate and he thought that he had jurisdiction to entertain the appeal. S. 408 of the Code of Criminal Procedure, 1898, says "any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the 1st class or any person sentenced under S. 349 or in respect of whom an order has been made or sentence has been passed under S. 380 by a Magistrate of the 1st class, may appeal to the Court of Session". So it is clear that only a Court of Session can hear appeals against convictions by 1st class Magistrates. It is contended for the accused before us that in as much as the trial was begun by a 2nd class Magistrate the appeal lay to the District Magistrate. This on the face of it is an untenable position. The District Magistrate has jurisdiction to hear appeals only from the decisions of 2nd class Magistrate. The moment a 2nd class Magistrate is invested with the powers of a 1st class Magistrate he becomes a 1st class Magistrate and any convictions by him in cases which were taken up by him as a 2nd class Magistrate would be only convictions as a 1st class Magistrate. We do not think it necessary to cite any authority but we may refer with approval to the case reported in *Sheobhanjan* v. *Emperor* (1). The District Magistrate not having had jurisdiction to hear the appeal his decision must be set aside as being without jurisdiction. We therefore set aside the acquittal by the District Magistrate on appeal, direct the Sessions Judge to send for the appeal records from the District Magistrate's Court, to take it on his file and to dispose of it according to law, after giving notice to the accused.

N. S. *Order of District Magistrate set aside.*

1. (1925) 6 P L T 554 : A I R (1925) Pat. 472.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE MADHAVAN NAIR AND MR. JUSTICE CURGENVEN.

P. S. Ayyathorai Mudaliar ... *Petitioner*. (Petr.).*

v.

M. P. Managala Goundar and another ... *Respondents (Respts.)*

Ayyathorai Mudaly v. Managala Goundar.

Madras District Municipalities Act (V of 1920), S 49 (2) (vi)—Rules framed under the Act for the conduct of elections of Municipal Councillors—R. 31—Candidate for election as Councillor—Candidate holding the office of trustee of a temple—Another Councillor holding the office of hereditary archaka in the same temple—Nomination of candidate rejected by Vice-Chairman on the ground of relationship of employer and servant existing between the two—Decision of Local Government under R. 31 holding that the relationship does not exist and cancelling the order of Vice-Chairman—If final so as to oust the jurisdiction of the Civil Court—Distinction between the interpretation of sections of the Act and rules framed under the Act.

Rule 31 of the rules relating to the conduct of elections of Municipal Councillors framed under the Madras District Municipalities Act of 1920 makes the decision of the Local Government final if questions arise as to the interpretation of those Rules. But where the objection raised relates not to the interpretation of the rules but to the interpretation of the specific provision of the Act itself, the decision of the Local Government is not final so as to oust the jurisdiction of the Civil Court to interpret the Act. There is a clear distinction between the provisions of the Act and the Rules framed by the Government under the Act.

The 1st respondent was nominated as a candidate for election as a Councillor to the Municipality but the Vice-Chairman held that his nomination was improper and invalid on the ground that he was holding the office of trustee of a temple wherein another person, who was already sitting as a Councillor in the Municipality, was a hereditary archaka, and that therefore there was the relationship of employer and servant between the two persons within the meaning of S. 49, cl. 2, sub-clause VI of the Madras District Municipalities Act. The 1st respondent thereupon moved the Local Government, under R. 31 of the Rules relating to the conduct of elections of Municipal Councillors framed under the Act, to decide on the validity of the objection raised against his nomination and the Government passed an order cancelling the order of the Vice Chairman. Subsequently the 1st respondent was elected as a Councillor. On an application filed for setting aside the election, the Subordinate Judge held that the decision of the Government under R. 31 upholding the validity of the nomination of the 1st respondent was final and the Civil Court had no jurisdiction to consider that question. The petitioner preferred a Civil Revision Petition against this order of the Subordinate Judge.

*C. R. P. No. 382 of 1927. 11th August 1927.

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Held, that, as the objection raised to the nomination related to the interpretation of S. 49 (2) (*vi*) of the Act and not to the interpretation of any rules framed under the Act, the decision of the Local Government thereon was not final under R. 31 so as to oust the jurisdiction of the Civil Court.

Sarvothama Rao v. *Chairman, Municipal Council, Saidapet,* (1923) I L R 47 M 585 : 45 M L J 23, distinguished.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Dindigul, dated the 28th day of February, 1927, in O. P. No. 8 of 1926.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for petitioner.

K. V. Krishnaswami Aiyar and *N. Swaminathan* for respondents.

The Court delivered the following

JUDGMENT :—This civil revision petition arises out of an application made by the petitioner for setting aside the election of the 1st respondent as a councillor for one of the seats in the first ward of the Palni Municipality. The chief ground alleged by him in support of his application was that on the date of the nomination of the 1st respondent he was holding the office of trustee of Sri Dandayuthapani Swami temple at Palni, that one Selvadandapani Gurukkal who was a heriditary archaka of the temple was already sitting as a councillor, that there is relationship of employer and servant between the two and that therefore his nomination and subsequent election were invalid under S. 49, cl. (2), sub-clause (vi) of Act V of 1920. When the alleged disqualification of the 1st respondent was brought to the notice of the Vice-Chairman, he held that his nomination was improper and invalid and excluded his name from the list of valid nominations. The 1st respondent, however, moved the Government, under R. 31 of the Rules relating to the conduct of elections of Municipal Councilors, to decide on the validity of the objection raised against his nomination, and the Government passed an order cancelling the order of the Vice-Chairman under sub-section (1) of S. 36 of the Act. Subsequently he has been elected as a member of the Palni Municipality. The Subordinate Judge held that the decision of the Government under R. 31 of the Rules relating to the conduct of elections upholding the validity of the nomination of the 1st respondent is final and that, in view of that Rule and the Government's decision thereunder, the Civil Court has no jurisdiction now to consider the question of the validity of the

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nomination. He therefore dismissed the petitioner's application. Various issues were raised in the case, but, in view of his opinion on this main issue, the Subordinate Judge did not go into the full merits of the petition.

It is argued before us that the Subordinate Judge's interpretation of R. 31 of the Rules relating to the conduct of elections is incorrect, that the relationship of master and servant existed between the 1st respondent and the Gurukkal who was already a member of the Municipality and that the Subordinate Judge, in dismissing the application, has declined to exercise the jurisdiction vested in him by law.

The question that we have to decide is whether, in the circumstances above mentioned, the decision of the Government as regards the validity of the nomination of the 1st respondent is final and excludes the jurisdiction of the Civil Court to decide that question. The Government has framed two sets of rules, one dealing with the enquiry into the validity of elections and the other relating to the conduct of elections and R. 31 appears in the latter class and runs thus: "If any question arises as to the interpretation of these rules otherwise than in connection with an election enquiry held under the rules for the decision of disputes as to the validity of an election, the question shall be referred to the Local Government whose decision shall be final". The alleged disqualification of the 1st respondent, as already pointed out, was based on the ground that, as he was the employer of the person who was already a councillor, he could not be elected under S. 49, cl. (2), sub-clause (*vi*) of the Act. This provision relating to the disqualification appears in the body of the Act and not in the Rules. The learned Subordinate Judge thus dealt with this objection: "It cannot be doubted that the present ground on which the nomination of the 1st respondent was sought to be excluded related to the conduct of the elections in the Municipality. S. 305, cl. (*c*) lays down that the rules framed by the Government must be read as part of the Act, *ie.*, as if enacted in the body of the Act. The Government therefore have reserved to themselves the right to interpret so much of the Act as corresponds to the rules incorporated in it. The objection therefore that the Government have right only to interpret their own rules as if they formed a category separate from the body of the Act is of no avail." The reasoning of the learned Subordinate Judge is unitelligible; we fail to see what section 305, cl. (*c*) and the inference to be deduc-

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ed from it has got to do with the decision of the question before us. This part of the Subordinate Judge's judgment has not been supported by the learned vakil for the respondents. Shortly stated, R. 31 according to its terms, makes the decision of the Local Government final if questions arise as to the interpretation of the rules regarding the conduct of elections formulated by the Government under District Municipalities Act. The objection now raised by the petitioner does not relate to the interpretation of any of the rules framed by the Government but it relates to the application of a specific provision of the Act. There is a clear distinction between the provisions of the Act and the rules framed by the Government under the Act. The Government, by constituting itsellf the final tribunal in interpreting the rules made by it, cannot, though the rules form part of the Act, reserve to itself the exclusive right to interpret the specific provisions of the Act thus ousting the jurisdiction of the Civil Courts. The decision relied on by the learned Subordinate Judge [*Sarvothama Rao* v. *Chairman Municipal Council, Saidapet*(1)] is inapplicable, as in that case the question for decision clearly related to the interpretation of the Rules. The true scope of Rule 31 is made clear by the following observation of Wallace, J. After quoting the rule, he states

"The Local Government which drafted the Rules is the final arbiter for deciding what the Rules mean, and the Civil Court cannot ordinarily be asked to decide whether the Local Government's interpretation of its own rules is right or wrong."

This is all what R. 31 states. It makes the Government the final arbiter for deciding what the Rules made by it mean. It does not give the Government the right to interpret the specific provisions of the Act thus excluding the jurisdiction of the Civil Court to do so.

In support of his argument that the Court has no jurisdiction when once the Government has passed an order under R. 31, the respondent's learned vakil drew our attention to R. 4, cl. 2, sub-clause (*i*) of the Rules relating to the conduct of elections of Muncipal Councillors, according to which, the Chairman in the course of the authority of the nomination papers can reject the nomination of a candidate if he is ineligible for election under S. 48 or S. 49 of the Madras District Municipalities Act, 1920, and argued that, since S. 49 is thus referred to in the rules, the Government, when called upon

1. (1923) 45 M L J 23.

to interpret a rule under R. 31, cl. 1, can, in so doing, also interpret S. 49 of the Act. We cannot accept this argument. If pressed to its logical conclusion it would mean that the Government, under the guise of interpreting its own rules, can also interpret the statute and thus take away altogether the jurisdiction of the Civil Court to do so. We cannot uphold a construction which brings about such an obviously undesirable result. In our opinion, the finality of the Government's decision under R. 31, cl. (1), attaches only to the interpretation of the rules and not to the construction of the statute.

We therefore hold that the lower Court erred in holding that the decision of the Government under R. 31 regarding the validity of the 1st respondent's nomination was final or binding upon the Court in this case. Holding the opinion that the order of the Government under R. 31, cl. (1) is final, the Subordinate Judge, though he has referred to all the issues in his order, has not really disposed the case on the merits. We would therefore set aside the order of the learned Subordinate Judge and ask him to take the petition on file and dispose of it according to law. The petitioner will get his costs here. The costs in the lower Court will abide the result.

N. S. *Petition allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Maniara Kuppathan *alias* Kuppan ... *Appellant** (*Prisoner*).

Kuppan, *In re.*

Criminal Rules of Practice, R 195—Force of confessional statement taken by Village Magistrate after commencement of Police Investigation—Admissibility in evidence—R 196—Object of—Confessional statement under—Admissibility in evidence, if voluntary—Questions to accused not put in form mentioned in R. 196 (2)—Effect.

R. 195 of the Criminal Rules of Practice is not a rule of law, but is merely a departmental rule, and a confessional statement made by the accused and reduced to writing by a Village Magistrate after the commencement of the Police Investigation is not inadmissible in evidence.

The whole object and policy of R. 196 of the Criminal Rules of Practice is that a Magistrate should satisfy himself that there is no compulsion by the Police or ill-treatment so as to raise the suspicion that the statement of the accused is not a voluntary statement, and, so long as the spirit of the Rule is satisfied, the confessional statement made before the Magistrate

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*Cr. Appeal No. 140 of 1927. 17th June, 1927.
(Cr. R. C. No. 245 of 1927).
(Taken up No. 8 of 1927)

Kuppan, In re.

is admissible in evidence, even though the questions put by the Magistrate to the accused were not in the form specified in Rule 196 (2) of the Criminal Rules of Practice.

The specimens of questions suggested in Rule 196 (2) are leading questions suggesting torture or ill-treatment by the Police and it is undesirable to put such questions in the form mentioned in the Rule.

Appeal against the order of the Court of Session of the North Arcot Division in Case No. 43 of the Calendar for 1926.

P. Veeraraghava Aiyar for appellant.

The Public Prosecutor for the Crown.

The Court delivered the following

JUDGMENT :—The accused in this case has been convicted by the Sessions Judge of North Arcot for having murdered his wife Chinnapillai. The accused is a barber, but the deceased was an *adi dravida*. She was previously married and after having been abandoned by her husband was married by the accused and had been abandoned by him 3 months before her death. There is the evidence of two witnesses for the actual occurrence, P. Ws. 5 and 10. P. W. 5 is a child of seven years who was related to the deceased as her niece. There is no reason to disbelieve either the evidence of P. W. 5 or that of P. W. 10. But apart from the evidence of these two witnesses there are confessional statements made by the accused. The first statement he made is Ex. N to the Village Magistrate on the 3rd of November.

The learned vakil for the accused drew our attention to R. 195 of the Criminal Rules of Practice which prohibits Village Magistrates from reducing to writing any confession or statement whatever made by an accused person after the police investigation has begun. The evidence of the Sub-Inspector of Police (P. W. 3) shows that the investigation began on the 2nd of November. But it is not clear whether the Village Magistrate knew this fact and therefore it is difficult to say whether the Village Magistrate was acting in disobedience of any rule. But, apart from whether he was obeying or disobeying a departmental rule, the effect of R. 195 is not to make Ex. N inadmissible in evidence. It is not a rule of law but merely a rule for the guidance of Village Magistrates. Under the law of evidence, Ex. N is admissible. Then again we have Ex. A, the confession made before the Joint Magistrate of Tirupattur, who is P. W. 1. The learned Vakil for the accused drew our attention to R. 196 (2) of the Criminal Rules of Practice which runs thus:

Kuppan, *In re.*

"Before recording the statement the Magistrate shall question the accused in order to ascertain the exact circumstances in which his confession is made and the extent to which the Police have had relations with the accused before the confession is made."

Ex. A shows that before the confession was taken the Magistrate put to him this question:—

'Do you understand that you are at liberty to make a confession or not as you like and are you aware that there is no necessity or complsion on you to make any such statement or confession which may be used in evidence against you.'

We think this question satisfies the spirit of R. 196 (2), but it is argued that there is no reference to the Police and the question does not expressly call the attention of the accused to the relations which the accused had with the Police. As samples of the questions which the Magistrate might put, R. 196 (2) mentions the following:—

(*a*) When did the Police first question you?

(*b*) How often were you questioned by the Police?

(*c*) Were you detained any where by the Police before you were taken formally into custody and, if so, in what circumstances?

(*d*) Were you urged by the Police to make a confession?

(*e*) Have you been ill-treated in any way by the Police?

These specimens of questions suggested in the Criminal Rules of Practice as questions that might be put to the accused seem to be leading questions suggesting torture or other ill-treatment by the Police and it seems to be undesirable to put such questions in the form mentioned in the rule. The whole object and policy of R. 196 is that a Magistrate should satisfy himself that there is no compulsion by the Police or ill-treatment so as to raise the suspicion that the statement of the accused is not a voluntary statement, and so long as the spirit of the rule is satisfied it is undesirable that questions should be put in this form showing a total want of trust in the Police. In the present case the question put by the Magistrate, we think, satisfies the rule, and the fact that the questions were not put in the form suggested by the rule does not make the statement, Ex. A, less valuable. At the end of Ex. A the Magistrate notes:

"I have explained to Kuppan that he is not bound to make a confession, that, if he does so, any confession he may make may be used as evidence against him, and I believe that this confession was voluntarily made."

Lower down in the questions we have another question by the Magistrate,

'Why do you make this confession now'?

and the answer is—

'I did it out of my excess of anger. So I want to confess'.

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Taking the whole of Ex. A, we are satisfied that there is nothing defective in it, and we doubt whether Rule 196 should be obeyed to the letter. Before the Sessions Judge the accused has retracted his confession; but, having regard to the other evidence and his earlier confessions, we do not attach any weight to this retraction.

The motive for the offence seems to be that the deceased had unlawful relations with other men at other times, but it is not suggested that anything happened on the day of the offence. The evidence about her bad conduct is too general, even taking the accused's statements, Exs. A and N. It is highly doubtful whether evidence of this kind justifies a Sessions Judge in not imposing the extreme penalty. The statement, Ex. N, shows that the accused was waiting at a place which deceased had to pass and thus the murder was pre-meditated. We are not able to follow the Sessions Judge when he says that the murder is not pre-meditated. But seeing that the learned Sessions Judge has not thought fit to impose the extreme penalty and seeing that some time has elapsed, we are not prepared to alter the sentence now.

The Appeal is dismissed.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE CURGENVEN.

M. W. Elliot, Official Receiver, Cuddappah ... *Appellant* and Petitioner (Petitioner)*

v.

Kopparapu Subbiah ... *Respondent in both (Respt.).*

M. W. Elliot Official Receiver, Cuddapah v. Subbiah.

Provincial Insolvency Act, S. 75(3)—Leave under—If condition precedent to right of appeal—Appeal presented in cases in which leave required—Admission of—Leave obtained or petition for leave presented with appeal—Duty to see to—Insolvency—Double administration as regards moveable and immoveable properties—Inconvenience of—Insolvent—Deed by—Transfer or agency for sale—Construction of deed—Provincial Insolvency Act, S. 53—Purchaser for valuable consideration—Meaning of—Transfer by debtor of entire property to trustee for benefit of creditors—Transfer within three months of insolvency petition—Validity—S 53, if self-contained—Trusts Act, S 5—Moveable property—Creation of trust in respect of—

*A. A. O. No. 482 of 1925 and C. M. P. No. 1124 of 1927. 12th April, 1927.

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Validity—Conditions—Transfer of moveable and immoveable property—Invalidity of, as regards either—Invalidity in toto—Condition.

The leave required by S. 75 (3) of the Provincial Insolvency Act is not a condition precedent to the right of appeal.

The officer who admits appeals for which leave under S. 75 (3) is required ought to see if leave has been obtained, or, there is at least a petition for it.

It is highly inconvenient, to say the least, that part of the assets of an insolvent should be administered under the direction of the Court, *i.e.*, by the Official Receiver, and part should be administered privately by a trustee appointed under a deed of trust executed by the insolvent. The Court will not *prima facie* be inclined to countenance an arrangement of that kind.

Within three months of presenting his petition for being adjudicated an insolvent, a debtor executed a deed under which he purported to transfer the whole of his property, moveable and immoveable, to a trustee for the purpose of realising its value and distributing the proceeds amongst his creditors.

Held, on the construction of the document, that it was not a transfer but one constituting the so-called trustee an agent for the sale of the property.

Held, further, that, if the deed amounted to a transfer at all, the transfer was not for valuable consideration and was not undertaken in good faith and was therefore voidable under S. 53 of the Provincial Insolvency Act.

Meaning of "purchaser" in S. 53:— A transfer to a trustee for the benefit of the creditors is not necessarily a transfer for valuable consideration within the meaning of the section, even though the parties to the transaction in good faith intend to secure an equitable distribution of asstes. *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar,* (1916) 30 M L J 415, dissented from.

Quaere whether the transfer is bad as being opposed to the spirit and policy of the Insolvency Law, and whether S. 53 is self-contained and a transfer of the kind in question must be avoided under that section or not at all.

Under S. 5 of the Trusts Act no trust in relation to moveable property is valid unless the document declaring it, if it be non-testamentary, is registered or unless the ownership of the property is transferred to the trustee. Where a debtor transfers by deed all his property, moveable and immoveable, to a trustee for the benefit of the creditors, and it is evident that his intention was that the transfer was to be valid and effective as regards both kinds of property or not at all, then, if, for any reason, the transfer is invalid and ineffective as regards one kind of property, it is invalid and ineffective in *toto.*

A. A. O. No. 482 *of* 1925:

Appeal against the order of the District Court of Cuddappah, dated 13th April, 1925, in I. A. No. 219 of 1925 in I. P. No. 13 of 1924.

C. M. P. No. 1124 *of* 1927:

Petition praying that in the circumstances stated therein, the High Court will be pleased to grant leave to the petitioner

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herein to appeal to the High Court against the order of the District Court of Cuddapah in I. A. No. 219 of 1925 in I. P. No. 13 of 1924.

B. Somayya for appellant.

E. Krishnamurthi for respondent.

The Court delivered the following

Odgers J.

JUDGMENTS :—*Odgers, J.* :—When this appeal first came on we adjourned it to see if the appellant, the Official Receiver of Cuddappah, had obtained leave of the District Court to appeal, or, if not, to enable him to apply to it for the leave. This is required as the matter falls under S. 75 (3) of the Provincial Insolvency Act and the appeal is not as of right. The District Judge has now on application made to him held that the appellant should have applied for leave prior to filing the appeal in the High Court. The words of the sub-section are

"may appeal to the High Court by leave of the District Court or of the High Court",

and the question is do they enact that leave is a condition precedent to sue. It is contended that it must be so, otherwise the provisions as to limitations for filing the appeal would be unmeaning. There is no doubt that this appeal was filed within 90 days but the objection is that it was not really an appeal when it was filed, as it was not accompanied by a leave to appeal or a petition asking for the same. It seems to me that it is a mistake on the part of the officer who admits these appeals not to examine them to see if leave has either been obtained or there is at least a petition for it. The words of Walsh, J., in *Balli* v. *Nand Lal* (1) may be quoted in this connection. The question may have to be raised hereafter as to whether in view of the provisions as to limitation, an appellant under S. 75 (3) must first be granted leave or must obtain leave before he appeals, but for our present purpose it is enough to say that the question seems not to have been so far raised and such authority as there is seems in favour of granting leave with retrospective effect. In *Ananthanarayana Aiyar* v. *Sankaranarayana Aiyar* (2), Spencer and Devadoss, JJ., held that an application for leave may be filed after the period of limitation had elapsed and that an appeal could not be held to be out of time for that reason. If it were, it could be excused under S. 78. In C. M. A. No. 314 of 1924, Ramesam and Madhavan Nair, JJ., permitted an appeal to be amended so as to make it one filed under S. 75 (3); they then gave leave to appeal. That appeal

1. (1916) 33 I C 773 at 775. 2. (1923) I L R 47 M 673.

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was originally filed as of right under S. 75 (2). We had ourselves previously adjourned the case to allow petitioner to obtain leave to appeal from the District Court. This was clearly a recognition of the retrospective effect of the Court's leave. In *Balli* v. *Nand Lal* (1), there was no leave and the Court allowed the case to be argued as the practice of the Court was not thoroughly settled. The same remark seems to apply here and it would be a good thing to settle the practice. The Allahabad Court therefore looked into the appeal and found there were no grounds to support it. Walsh, J., said he could regard it as a sufficient ground to refuse leave if he found that such an appeal had been admitted as a matter of course when there is only an appeal by leave. Piggott, J., pointed out that there had been cases in that Court where leave to appeal had been granted after hearing the arguments but that such proceeding should not form the general practice. It was, however, nowhere assumed that leave was a condition precedent to the right of appeal. We have also been referred to a somewhat similar case under the Pensions Act. *Mahomed Asmat Ali Khan* v. *Lalli Begaum* (3) where the words are

"No Civil Court shall entertain any suit except as hereinafter provided".

and a Civil Court

"shall take cognisance of any such claim upon receiving a certificate from the Collector".

Their Lordships held that the Court might proceed with the suit after receipt of the certificate, for the suit had been begun without it. It therefore seems to me that, as the authorities go at present, the District Judge was wrong and we have power to grant the leave now for which a petition has been put in; and we have heard sufficient of the case to lead us to think that it is a case in which leave ought to be granted. The merits will therefore be argued.

Curgenven, J.

Curgenven, J. :—I agree.

This Appeal against order again came on for hearing on the merits, the Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—I have already dealt with the question as to the necessity of leave being obtained as a condition precedent to the right of appeal. I now come to consider the case on its merits.

1. (1916) 33 I C 773 (Allahabad High Court).
3. (1882) 9 I A 8 : L R 8 C 422 (P. C.).

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Odgers. J.

The learned District Judge has held that, in respect of Ex.I which is a transfer of the entire property of the Insolvent in trust for distribution to his creditors, the trust is inoperative with respect to the immoveables which therefore become vested in the Official Receiver but that it is operative as regards the moveables which are therefore vested in the trustee. It is perfectly obvious on the face of it that it is highly inconvenient, to say the least, that part of the assets of an insolvent should be administered under the direction of the Court, *i. e.,* by the Official Receiver, and part should be administered privately by the trustee who presumably would be more or less guided by the wishes of the insolvent himself, so that *prima facie* one is not inclined to uphold an order of this sort. But of course if it is correct in law there is nothing more to be said. Mr. Somayya for the appellant has strongly urged on us that, apart from all other considerations, the principle enunciated in *Manmohan Das* v. *N. C. Macleod* (4) is the one to be applied here. In that case the Bombay High Court held, relying on *Marks* v. *Feldman* (5) that a transaction, such as the one in question, though perfectly valid as between the parties, if bankruptcy supervenes and the transferor is adjudicated, becomes a fraudulent preference and invalid against the assignee, not under any express provision in the Bankruptcy laws, but as contrary to the spirit and principle of those laws; and Sir Lawrence Jenkins, C. J., says that the principle enunciated in *Marks* v. *Feldman* (5), does not depend on the doctrine of relation back which under the English Law goes back to the first available act of bankruptcy but under the Indian only to the date of the petition. It has been strongly contended on the other side that the whole theory of *Manmohan Das* v. *N. C. Macleod* (4) is wrong now-a-days because it is based on S. 24 of the Insolvent Debtors Act which was the only section under which a fraudulent preference could then come and secondly that the English case on which it is based does really depend in spite of the declaration of Kelly, C. B., on the theory of relation back in the English Law. It is further contended that now that we have Ss. 53 and 54 in the Act invalidating certain transactions by the insolvent there is no scope for the importation of a general principle such as may have been imported with justification under the old S. 24. The argument is that the Act is self-sufficient and self-contained and that unless a transaction is

4. (1902) I L R 26 B 765: 5 (1870) L R 5 Q B 275.

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voidable by its provisions it must be held protected. Interesting as the discussion in *Manmohan Das* v. *N. C. Macleod* (4) is, it is not to my mind necessary to decide at the present moment whether in fact there is the principle *dehors* the Insolvency Law which would render invalid the transfer to an assignee of his entire property by a man subsequently adjudicated.

The terms of Ex. I in this case are important. It is dated 10th January 1924 and is called an "agreement of consent" executed by the insolvent. The deed recites that his cloth business is in difficulties, his creditors are worrying him and he has no means to fully discharge their debts. So he has put in possession of the trustee his entire properties, accounts, documents relating to the business, piece goods and the house. He also promises to deliver some bundles of cloth to the trustee on the next day and recites delivery of the lock and key of the shop in token of having put the trustee in possession thereof. The trustee is to sell all the piece goods, accounts, documents, etc., but, when sold, the transferor himself is to execute a sale deed of the house. Towards the end of the document he again repeats "I have put you in possession of all the documents relating to piece goods, accounts etc." Ex. II is a document of even date by 10 of the creditors out of 40, called an agreement, consenting to the sale of this property of the Insolvent and a payment of Rs. 250 to the insolvent. It is perfectly clear to my mind that this document is really not a transfer but one constituting the so-called trustee Subbiah an agent for the sale of this property. If I am wrong and it is a transfer, then the question is, does it infringe the provisions of S. 53 of the Provincial Insolvency Act which begins "any transfer of property" and this transfer of property is said in S. 2 (*f*) of the Act to include "transfer of any interest in property and the creation of any charge upon property". It is all very well to say that the Insolvency Act is self-contained, but any transfer of property must mean, I think, a transfer recognised by the general law. If this is a transfer and if it is a trust for creditors, it must conform to the requirements of the Law of Trusts, that is to say, Ss. 4, 5 and 6 of the Trusts Act must be satisfied. If so, a mere declaration of trust with regard to moveable is clearly not enough as laid down in *Alagappa Chettiar* v. *Lakshmanan Chettiar* (6);

4. (1902) I L R 26 B 765. 6. (1918) 51 I C 253: 24 M L J 267.

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a decision of a Bench of this Court, where the learned Judges were of opinion that there were no words of transfer to be found in the document, and no distinction either with regard to the immoveables or the moveables, and Seshagiri Aiyar, J., said that the document was one and indivisible and it was never the intention of the parties that the moveable property should be taken without the immoveable, and that if there were no words conveying the immoveable property you cannot say there is anything in the document which would convey the moveable. There may be provisions in a document of transfer which are separable and the invalid part may then be separated from the valid part and the latter can be given effect to while the former fails, and some attempt has been made here to introduce the analogy of partition deeds of both immoveable and moveable properties. The answer to that is that here it is perfectly obvious from Ex. I that the trustee was intended to take everything. "I have put in your possession my entire properties"; and in the next sentence the house is mingled with the accounts and the documents and the piece goods. If this document therefore is to be construed as one entire document, if one part of it is bad, the whole of it is bad. That is really enough to dispose of the matter. But I think that, under the provisions of S. 53, the transfer, if it is a transfer, may also be impugned. In other words, the trustee is not a purchaser in good faith and for valuable consideration. It is true that in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (7), Sadasiva Aiyar and Moore, JJ., held that the responsibility undertaken by a person to whom properities are transferred in consideration of his taking such onerous work fell within the expression "valuable consideration". Hence the creditors in that case who undertook to be trustees of the insolvent's properties for the benefit of the rest and had been discharging the duties of trustees came within the protection afforded to trustees for valuable consideration. With great deference I am unable to agree with the decision unless it can be distinguished on the ground that we have no proof here that the transferee ever undertook any onerous work or had been discharging the duties of a trustee. It seems to me perfectly clear from the judgment in *Ex parte Hillman: In re Pamfrey* (8) that a trustee of a post nuptial settlement of leaseholds for the benefit of the settlor's wife and children is not a purchaser

7. (1916) 30 M. L. J. 415 8. (1879) 10 Ch. D. 622.

within S. 91 of the Bankruptcy Act. Jessel, M. R., said that the word "purchaser" means a 'buyer' in the ordinary commercial sense. In *Hance* v. *Harding* (9) this case in 10 Ch. D. was explained. In the former case, the father of the settlor had conveyed certain lease-hold properties to trustees on trust for the bnefit of the settlor's children. At the same time the settlor assigned a policy of insuranse on his life to the same trustees for a like purpose. There was no intention to delay or defeat the creditors of the settlor and the transaction was perfectly *bona fide.* The only point was whether the settlement was valid, and the settlor's father, the settlor having become bankrupt, was a purchaser in good faith and for valuable consideration. The Court of Appeal held that he was, because the father gave something in order to induce the son to give something. In this there was ample *quid pro quo* and this was the meaning to be applied to the word "purchaser". As pointed out in '*Ex-parte Hillman: In re Pamfrey* (8), the trustees had not given something to procure something for other persons nor did they give anything at all. The case in *Ex parte Hillman: In re Pamfrey* (8), according to Lord Esher, decided that such purchasers as those were not purchasers within the section and that in order to constitute a purchaser within the section there must be valuable consideration. Both cases were considered in *In re Pope: Ex parte Dicksee* (10) by the Court of Appeal. In that case there was a settlement post nuptial made by a bankrupt within two years of his bankruptcy in favour of his wife and children in consideration of the wife refraining from taking divorce proceedings against the bankrupt. The majority of the Court of Appeal held that there was valuable consideration according to the findings of fact in the Court below and that the purchaser is equivalent to a buyer, following *Hance* v. *Harding* (9). On the other hand, it is something more than a conveyancing term and is not satisfied by a deed such as an assignment of leaseholds, which might render the assignee a purchaser within the Statute of 27 Elizabeth, Ch. 4.

I therefore think that Ex. I comes within the mischief of S. 53 and that the trustee so-called is not a purchaser in good faith and for valuable consideration. That he was not a purchaser in good faith is, I think, evident from the mere recitals in the deed. He must have known from these that the

8. (1879) 10 Ch. D 622. 9. (1888) 20 Q B D 732.
10. (1908) L R 2 K B 169.

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transferor so-called could not pay his debts in the ordinary course of business and was in financial difficulties.

It has been observed that although the assignment of all the man's property is an act of insolvency under the Provincial Insolvency Act, S. 6 (*a*), it is not for that reason necessarily void. This has recently been pointed out by Coutts Trotter, C. J., and V. V. Srinivasa Aiyangar, J., in *The Official Assignee of Madras* v. *O. R. M. O.R.S. Firm* (11), that though an act of bankruptcy is a ground for adjudication, it does not necessarily follow that the adjudication extends to and comprises all the legal consequences in all the various aspects of the act. By that I understand the learned Judges to mean that, although a certain act of a man may be sufficient to adjudicate him an insolvent, it does not necessarily mean without more that the act is for example a fradulent preference under S. 53. For these reasons the order of the District Judge cannot be supported with regard to the moveable properties mentioned.

The Civil Miscellaneous Appeal must therefore be allowed with costs.

Curgenven, J.

Curgenven, J. :—Within three months of presenting his petition, the debtor in Insolvency Petition No. 13 of 1924 on the file of the District Court of Cuddappah executed a deed under which he purported to transfer the whole of his property, moveable and immoveable, to a trustee (now the respondent) for the purpose of realising its value and distributing the proceeds amongst his creditors. This transaction has been impugned by the Official Receiver, and in his order now under appeal the learned District Judge, while holding that the assignment was invalid so far as it related to the immoveable property, upheld it as regards the moveables.

Three separate lines of argument have been employed to show that the assignment deed is voidable or void:

(*a*) Under S. 53 of the Provincial Insolvency Act.

(*b*) As opposed to the spirit and policy of the Insolvency Law.

(*c*) As regards the moveables as not meeting the requirements of the Trusts Act.

With regard to (*a*), S. 53 declares to be voidable as against the receiver a transfer of property made within two years of the order of adjudication and otherwise than "in favour of a purchaser or incumbrancer in good faith and for

11. (1926) 52 M L J 352.

valuable consideration". This transaction took place within the two years; and it is therefore for consideration whether the three conditions required to protect it from voidability, that the transferee is a purchaser or encumbrancer, that he acted in good faith, and that there was valuable consideration, were satisfied.

It would seem at first sight that both the first and the last were wanting. As to the first, there is no suggestion that the transferee is an 'encumbrancer' and if by 'purchaser' is meant a 'buyer', as that term is used in the Transfer of Property Act, it would require him to be a party to a 'sale' as defined in S. 54 of that Act, a definition which cannot be made applicable to a transfer of the nature under consideration. A more extended significance has however been given to the term 'purchaser' in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (7), a case decided under S. 35 of the Provincial Insolvency Act of 1907, corresponding to the present S. 53, by Sadasiva Aiyar and Moore, JJ. That too related to a transfer of property by a person who subsequently was adjudicated, for the purpose of distributing his assets among his creditors. Sadasiva Aiyar, J., appears to assume that 'purchaser' means no more than 'transferee'. Moore, J., following an English case, *Hance* v. *Harding* (9), held that 'purchaser' in the section is used not in the ordinary legal sense of one who has bought a property under a contract of sale and purchase, but means a person who has given valuable consideration. The facts of *Hance* v. *Harding* (9) were these. The settlor, by post nuptial settlement made in pursuance of an arrangement between himself and his father, assigned a policy of insurance upon his life to trustees on trusts for the benefit of his children, the settlor's father at the same time conveying certain leasehold property to the trustees on similar trusts. The settlor became bankrupt and the Official Receiver claimed the money payable under the policy on the ground that the policy was void under S. 91 of the Bankruptcy Act of 1869 which, like the Indian Act, exempts a transfer "in favour of a purchaser or encumbrancer in good faith and for valuable consideration". It was found that the transaction was entered into in good faith and not with any intention to defeat or defraud the settlor's creditors. Lord Esher, M. R., after exonerating the parties from any imputation of improper

7. (1916) 30 M L J. 415. 9. (1888) 20 Q B D 732.

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motive, proceeded to hold that the settlor's father was a purchaser within the meaning of the section because he had given something to get something for other person, *viz.*, the family of his son, and he had given it to induce his son to give up his interest in the insurance policies; that is to say, he held that a 'purchaser', as used in this context, means no more than a transferee for valuable consideration. Sir James Hannen, the other learned Judge who decided this case, makes this clear by saying that the word must not be treated as a conveyancing term, but must be considered as applying to cases where there is a *quid-pro-quo*. Reference is made in this case to a decision of the Court of Appeal, *Ex parte Hillman: In re Pamfrey* (8), where a construction has been given to the word "purchaser" as used in this connection. Jessel, M. R., who delivered the leading judgment in that case, expressed the view that it meant a 'buyer' in the ordinary commercial sense, not a 'purchaser' in the legal sense of the word. The question arose in that case whether an assignment on trust for the benefit of the settlor's wife and children was void under S. 91 of the Bankruptcy Act upon the settlor being adjudicated a bankrupt, and Lord Esher says:

"it is impossible to say that in any sense of the word the trustee for the settlor's wife and children is a 'buyer' of the settled property".

No distinction can, I think, be drawn between the circumstances of that case, in its essentials, and the present case of a transfer to a trustee for the benefit of the creditors. As is pointed out in *Hance* v. *Harding* (9), not only were the trustees of the settlement in the earlier case not purchasers but also they had given nothing at all in the shape of a consideration, and so too here, if there was a transfer it appears to me that it was without consideration. It is true that in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (7) in similar circumstances, consideration was found to have been given on the ground that it was constituted by the responsibility undertaken by the transferee as trustee. In support of this proposition Sadasiva Aiyar, J., relied upon *Narayan Coomari Debi* v. *Shajana Kanta Chatterjee* (12). In that case, however there was an agreement to pay an executor a salary in consideration of discharging his duties as executor, and it is clear that the rendering of services which the executor was under no legal obligation to render was good consideration for

7. (1916) 30 M L J 415. 8. (1879) 10 Ch. D 622.
9. (1888) 20 Q B D 732. 12. (1894) I L R 22 C 14.

M. W. Elliot, Official Receiver Cuddapah v. Subbiah. Odgers, J. Curgenven, J.

the remuneration. But can it be said here that the assumption by the transferee of responsibility for distributing the assets, although it satisfies the definition of consideration as something done or promised at the desire of the transferor, was consideration for the transfer? What really happened, as it seems to me, was that the trustee here gave his services gratuitously and without consideration of any benefit accruing to him from the transfer, which was merely an arrangement enabling him to render those services. For this reason and following *Ex parte Hillman: In re Pamfrey* (8), I must respectfully differ from the view taken in *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (7) and hold that there was no consideration. In applying the section, it remains to consider whether the transfer was 'made in good faith'. On behallf of the respondent it is argued that this condition was satisfied inasmuch as there was no intention to benefit one or more creditors at the expense of the reminder. No doubt it may be said that the parties to the transaction in good faith intended to secure an equitable distribution of assets. But I am inclined to think that something further is needed in order to exempt the transfer upon this ground. It is not disputed that the transferor was at the time in embarrased circumstances or, in fact, actually insolvent. He filed his petition less than three months later. A transferee who takes without knowledge of his transferor's financial condition may be exonerated on the ground of good faith, but can the same be said with regard to a transfer which is in violation of the principles of the insolvency law? An act is not done in good faith which is done without due care and attention; and it seems to me that, had the parties exercised due care and attention, and acquainted themselves with the effect of their action, they would have discovered that it did violate those principles. The transfer by a debtor of all or substantially all his property to a third person for the benefit of his creditors generally is by S. 5 of the Provincial Insolvency Act declared to be an act of insolvency. The effect of such an act, both under English and under Indian Law, has been considered by Jenkins, C. J., and Starling, J., in *Manmohandas* v. *N. C. Macleod* (4), a decision which has a bearing upon another aspect of the present case. Two debtors executed a deed of assignment to trustees in favour of their creditors, and the transfer, as an act of insolvency, was made the foundation for

4. (1902) I L R 26 B 765. 7. (1916) 30 M L J 415.
8. (1879) 10 Ch. D. 622.

M. W. Elliot, Official Receiver Cuddapah v. Subbiah.

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a petition by certain crtditors who did not assent to it. The question was whether the deed could be avoided. The insolvency law then in force was the Indian Insolvent Act (Stat. 11 and 12 Vict., C. 21), and the learned Judges give reasons, which it is unnecessary to consider, for their inability to avoid the transactions under S. 24. They then consider whether it is voidable or void upon other grounds. Under the English Law an act of insolvency, such as this, is *ipso facto* void, but one reason at least for this is that a bankruptcy relates back to any acts of bankruptcy which the debtor may have committed, whereas in India the vesting of an insolvent's property takes effect by relation only from the filing of the petition. The doctrine of relation back therefore cannot be invoked to invalidate the transferee's title. The learned Judges however refer to

"the view repeatedly enunciated, that an assignment by a trader of all his assets is vitiated by the fact that it contravenes the spirit of the Bankruptcy laws, and is void not merely because the title of the assignee prevails by relation back".

In particular, they derive authority for this view from the Privy Council case *Khoo Kwat Siew* v. *Wooi Taik Hwat* (13) and apply it to the case before them as not being dependent upon the theory of relation back. I am not at the moment concerned with the voidability of the transfer as an act of insolvency, but only with the contention that it contravenes the principles of the insolvency law. That proposition, I think, cannot be questioned. The Insolvency Law provides machinery for the preservation and distribution of an insolvent debtor's assets and any private arrangement which would defeat that purpose must be in conflict with the intention of the law.

"It has undoubtedly been long settled"

says Lord Eldon in *Dutton* v. *Morrison* (14)

"that if a trader conveys all his estate and effects, that is an act of bankruptcy, as it seems upon two principles, first, that by that act the trader necessarily, perhaps not intending it, deprives himself of the power of carrying on his trade, secondly, that he endeavours to put his property under a different course of application and distribution among his creditors from that which would take place under the Bankruptcy law".

In my view the parties to such a transaction cannot be said to be acting in good faith if the consequence of their act is such an infringement. I think therefore that neither was

13. (1891) L R 19 I A 15 : I L R 19 C 223 (P C).
14. (1809) 17 Ves. Jun. 193 : 34 E. R. 77.

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the transfer for valuable consideration nor was it undertaken in good faith, that, if it amounted to a valid transfer at all, it is voidable under S. 53.

The second ground for avoiding the transfer deed is (*b*) that it is opposed to the spirit and policy of the Insolvency Law. I have already substantially dealt with this point in considering the question of good faith under S. 53 and inasmuch as I have held that the assignment is voidable under that section it seems unnecessary to establish that it would be also voidable as offending against the general principles of Insolvency. For such a proposition, as I have already said, the decision in *Manmohandas* v. *N. C. Macleod* (4) affords authority. That decision, however, was under the old Indian Insolvency Act, which contained no provision similar to the present S. 53. It is therefore arguable that since statutory provision is now made for the avoidance of transfers as such and not merely of fraudulently preferential transfers, the transfer must be avoided under that section or not at all. Assuming that section not to apply to a case of this description, it would certainly be anomalous that an insolvent could transfer the whole of his property to a trustee for distribution and on the next day file his petition, whereupon the receiver would be incapable of touching any of the estate. It would be an anomaly that the Insolvency Act should make such a transfer an act of insolvency and yet contain no provision for setting it aside. I have no doubt that the framers of the Act deemed that S. 53 would sufficiently provide for such a case, as I think it does. That being so, I do not think it is necessary to look outside the Act for grounds for declaring the transfer void.

(*c*) The third and the last line of argument is that the assignment deed does not satisfy the requirements of the Trusts Act and that for more than one reason. Under S. 4 the purpose for which a trust may be created must be lawful and a purpose is not lawful if it is of such a nature that, if permitted, it would defeat the provisions of any law. In my view the purpose of the trust here is designed to defeat the provisions of the Insolvency Act. Apart from this, under S. 5 no trust in relation to moveable property is valid unless the document declaring it, if it be non-testamentary, is registered or unless the ownership of the property is transferred to the trustee. As already stated, the document in the present case is unregistered

4. (1902) I L R 26 B 765.

M. W. Elliot, Official Receiver Cuddapah v. Subbiah.

Curgenven, J.

so that no trust would have been created unless the ownership of the moveables was transferred to the trustee. I am unable to extract such a conclusion from the trust deed, Ex. I. It recites no doubt that the debtor puts his trustee in possession of all his properties, but there is nothing to show that more was meant than that he should hold them for purposes of sale, and, in fact, in the case of the only piece of immoveable property, a house, he himself undertakes to execute a sale-deed in respect of it to any purchaser, which shows that he at least retained the ownership of the house. I think it may be inferred that he also retained his title to the moveables. If this be so, then there was neither a valid trust nor a valid transfer, so that it would not even be necessary to resort to S. 53 of the Act to recover the property. A further argument has been used that the transfer purported to be of the entire effects of the debtor and that he had no intention of making a transfer of only a part. Since therefore the transaction so far as the immoveable property is concerned has been set aside, the whole should be set aside. There is some authority for this view in *Pothi Naicken* v. *Naganna Naicker* (15), a case relating to partition, where it was held that in the absence of any clear intention that the moveables should be partitioned apart from the immoveables, the document which for want of registration could not affect the immoveables did not even affect the moveables. The principle would appear to be that when there is an entire contract and part of it cannot be enforced, the whole of it goes, whereas it is otherwise when an instrument contains two or more distinct contracts in which case they are severable. It is unnecessary in the present case to stress the inconvenience which would arise from an administration of the immoveable property by a receiver under the Insolvency Act and of the moveables by a private person, and I think it may well be taken not to have been the intention of the executant of the deed that this consequence should ensue. I consider accordingly that under the Trusts Act also the deed would be invalid.

I agree therefore with my learned brother that the order of the learned District Judge so far as it declares the respondent to be a duly constituted trustee in respect of the moveable property should be set aside with costs and the Official Receiver empowered to take possession of the moveables as well as of the house.

A. S. V. —— *Appeal allowed.*

15. (1915) 30 M L J 62 (F B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

The Crown Prosecutor ... *Appellant**

v.

Khadir Mohideen ... *Accused.*

The Crown Prosecutor *v.* Khadir Mohideen.

Motor Vechicles Act, VIII of 1914, S. 6—Conviction under—Liability of owner of motor-bus for—Knowledge on his part of expiry of license—Absence of—Effect.

A motor-bus owner must assure himself that he is licensed, and cannot escape liability under S. 6 of Act VIII of 1914 on the ground that the expiry of the license was without his knowledge.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Chief Presidency Magistrate, Madras, in Calendar Case No. 24824 of 1926 on his file.

V. Viswanatha Sastri for accused.

K. P. M. Menon, the Crown Prosecutor.

The Court made the following

ORDER :—Appeal against the acquittal of a motor-bus owner for allowing his driver to drive his omnibus without a license in contravention of S. 6 of Act VIII of 1914.

The license had expired and the accused pleaded that the expiry was without his knowledge. A man cannot entrust his car to another person and plead that he presumed that he was licensed. He must assure himself that he is licensed.

The acquittal is accordingly set aside. Accused is found guilty of allowing his motor vehicle to be driven by a person without a license as proved by P. Ws. 1 and 2 and is fined Rs. 5 (Rupees five), in default one week's simple imprisonment—Ss. 6 and 16 of Act VIII of 1914.

A. S. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Muhammad Sheriff Sahib ... *Petitioner*† (*Complainant*)

v.

Moulvi Abdul Karim Sahib and others ... *Respondents* (*Accused*).

Muhammad Sheriff Sahib *v.* Abdul Karim Sahib.

Criminal Procedure Code, S. 253—Charge groundless—Finding as to—What amounts to—Discharge of accused without examining all witnesses cited by complainant—Legality of—Conditions

*Crl. Appeal No. 241 of 1927. 26th August 1927.

†Crl. R. C. No. 974 of 1926. 19th August, 1927.

(Crl. R. P. No. 844 of 1926).

Muhammad Sheriff Sahib v. Abdul Karim Sahib.

To say that no case is made out is not tantamount to saying that the charge is groundless within the meaning of S. 253, Criminal Procedure, Code.

Where a complaint *prima facie* discloses an offence, a Magistrate cannot hold the charge to be groundless under S. 253, Criminal Procedure Code, unless he knows what is the sort of evidence that is going to be adduced to prove it.

Where a Magistrate discharged the accused under S. 253, Criminal Procedure Code, without examining all the witnesses cited by the complainant, and without attempting to find out what the witnesses, whom he refused to examine, were going to say, *held* that the discharge was not in accordance with law.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session of East Tanjore Division at Negapatam in Criminal Revision Petition No. 7 of 1926, presented to revise the order of the Court of the Sub-divisional 1st Class Magistrate of Mayavaram in C. C No. 17 of 1925, discharging the accused.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar* for petitioner.

C. Narasimhachari and *K. Sankara Sastri* for respondents.

The Court made the following

ORDER :—The Magistrate in this case has discharged the accused refusing to examine all the witnesses cited by the complainant. Now, while S. 253 authorises the Magistrate to discharge an accused person before all the witnesses are examined, if, for reasons to be recorded by him, he considers the charge to be groundless, there are two reasons why his procedure cannot be supported by that section. First, he does not say he finds the charge to be groundless, and I do not agree with the Sessions Judge in his revision order that to say that no case is made out is tantamount to saying the charge is groundless. In fact, the section itself uses both phrases, evidently not in the same sense.

Secondly, where a complaint *prima facie* discloses an offence, a Magistrate cannot hold the charge to be groundless unless he knows what is the sort of evidence that is going to be adduced to prove it, and he cannot for example examine one or two witnesses or, for the matter of that, no witness at all, and then, without knowing what the other witnesses are going to say, hold that the charge is groundless. He can only judicially come to such a conclusion when he has at least ascertained from the

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complainant what is the nature of the evidence that the other witnesses are going to give. If he then finds that, even if that evidence was given, the charge would be groundless, it is open to him to discharge the accused on that ground.

In the present case, the Magistrate has, so far as appears, made no attempt to find out what the other witnesses were going to say and it was not therefore open to him to discharge the accused. I am informed that two of the witnesses, not examined by him, compositors of the press, are prepared to give evidence of value against accused 4, 5 and 8. That evidence cannot be shut out by the arbitrary method of discharging the accused before these witnesses have been heard.

The discharge of accused 4, 5 and 8 therefore is not in accordance with law and is set aside. The case will be further enquired into and decided on the full evidence proffered by complainant, unless, for reasons to be recorded, the Magistrate refuses to examine any witnesses on the ground that his evidence even, if taken, will not materially help the case of the complainant.

The further enquiry will be held by the present Sub-divisional Magistrate, Mayavaram.

A. S. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ANANTAKRISHNA AIYAR.

Nokole Behara, *In re.*

Nokole Behara and others ... *Petitioners** (*Accused Nos.* 2 *to* 12).

Penal Code, S 378—Fish confined in ponds—Theft of—Conviction for—Legality.

Fish, which are confined in ponds and cannot therefore escape from the same and go elsewhere, and which are capable of being caught only by baling the water out from the ponds, can be the subject of theft.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Berhampore in Criminal Appeals Nos. 75 to 85 of 1926, preferred against the judgment of the Court of the Second Class Magistrate of Somepetta Taluk in C. C. No. 64 of 1926.

S. Subramania Sastri for petitioners.

The Court made the following.

ORDER :—Two points have been argued in this case, (1) that it is not shown that the place where the accused fished was

*Crl. R. C. No. 358 of 1927. (Crl. R. P. No. 315 of 1927). 29th August, 1927.

Nokole Behara. *In re.*

within the Government village and (2) that fish could not be subject of theft.

On the first point there is the definite finding that the place of fishing is within the limits of Manikyahur (Government) village. The evidence given by the prosecution witnesses supports that finding which is one of fact. (2) As regards the 2nd point there is the finding that the fish were in ponds and that it is by baling the water out from the ponds that fish are caught in this case. They are confined in the ponds and could not escape from the same and go elsewhere. Such fish could be the subject of theft [*Per Miller*, J., in *Manchu Paidigadu* v. *Kadimsetti Tammayya* (1)].

The petition is dismissed.

A. S. V. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADHAVAN NAIR.

Vijayaranga Naidu and another ... *Petitioners** (*Accused*).

Vijayaranga Naidu, *In re.*

Indian Penal Code, S. 114—Abetment—Mere presence of alleged abettor at occurrence, if constitutes—Conviction under Ss. 114 and 326 on ground of mere presence of abettor at occurrence—Legality of

To come within S. 114 of the Penal Code, the abetment must be complete apart from the presence of the abettor.

Petitioner was convicted under Ss. 114 and 326, Indian Penal Code, having abetted the 1st accused (his son), who was himself convicted under S. 326, Indian Penal Code, of having voluntarily caused grievous hurt with an aruval to P. W. 1. The only abetment with which the petitioner was charged was his being present at the occurrence, and there was no evidence of any conspiracy prior to the occurrence between the petitioner and his son to way-lay P. W. 1 and cut him.

Held, that the conviction of the petitioner under S. 326 read with S. 114, Indian Penal Code, was illegal.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of Trichinopoly in Criminal Appeal No. 36 of 1926 (C. C. No. 18 of 1926 on the file of the Court of the Sub-divisional Magistrate of Trichinopoly).

V. L. Ethiraj and *A. S. Sivakaminathan* for petitioners.

K. N. Ganapathi for the Public Prosecutor for the Crown.

The Court made the following

ORDER :—The petitioner is the 2nd accused in C. C. No. 18 of 1926 on the file of the Sub-divisional Magistrate, Trichinopoly

*Crl. R. C. No. 151 of 1927. 25th August, 1927.
(Crl. R. P. No. 133 of 1927).

1. (1913) 22 I C 429 : 1914 M W N 168.

Vijayaranga Naidu, *In re.*

His son, the 1st accused, was convicted under S. 326, Indian Penal Code, with having voluntarily caused grievous hurt with an aruval to P. W. 1. The petitioner was convicted under Ss. 114 and 326, Indian Penal Code, with having abetted the 1st accused (the son) and being present at the occurrence. He was sentenced to rigorous imprisonment for four months. It appears from judgments of the Lower Courts that the part taken by the petitioner in the commission of the offence was only this, namely, that he desired his son to cut P. W. 1. In one part of the judgment of the Sessions Judge, the part played by the petitioner is thus described:

"Appellant 1 (the son) cut him with an aruval at the instigation of appellant 2 (the petitioner)."

There is no evidence that prior to this incident there was any conspiracy between the father and son to waylay P. W. 1 and cut him. The petitioner himself has not taken any other part in the offence. On these facts the Courts below convicted him under Ss. 114 and 326, Indian Penal Code. It appears to me that the conviction cannot stand and should be set aside. To come within S. 114 of the Penal Code, the abetment must be complete apart from the presence of the abettor. The only abetment charged in this case required the presence of the abettor and as I have already observed there is no evidence of any consipiracy prior to the occurrence between the petitioner and his son. In these circumstances S. 114 cannot be invoked for convicting the petitioner reading with S. 326. This view of S. 114 was taken by the learned Judges of the Calcutta High Court in *Ram Ranjan Roy* v. *Emperor* (1). In that case the facts were very similar to the facts of the present case except that the main charge there was one of murder. This decision has been followed by our High Court in *Annavi, In re.* (2). The same view of the law has been taken by a Bench of this Court in *In re. Jogali Bhaigo Naiks* (3). In this view the conviction of the petitioner under S. 326 read with S. 114 must be set aside.

The petitioner was sentenced to undergo 4 months rigorous imprisonment of which I understand he has already undergone three months. I do not think, therefore, that it is necessary in the interests of Justice that he should be called upon to undergo a fresh trial. I set aside the conviction and sentence and acquit him. His bail bond will be cancelled.

A. S. V. *Petition allowed.*

1. (1914) I L R 42 C 422. 2. (1924) 21 L W 19. 3. (1926) 97 I C 958.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Ibraya Rowthan and another ... *Petitioners** (*Accused*).

Ibraya Rowthan, *In re.*

Criminal Procedure Code, S. 123—Order for simple imprisonment for one year in default of giving security—Legality—Power of summary Court to award more than 3 month's imprisonment.

S. 123 of the Criminal Procedure Code contemplates that the accused shall be separately brought up for sentence if security is not furnished, and consequently an order that the accused shall give security and, in default, suffer simple imprisonment cannot be sustained.

An order that the accused shall suffer simple imprisonment for *one year* in default of giving security cannot be sustained under S. 123 of the Criminal Procedure Code, since the accused is entitled to be released from custody the moment he furnishes the security. The sentence should run "for one year or until such date within that year as the required security be furnished".

A summary Court has power to award under S. 123 of the Criminal Procedure Code more than 3 month's imprisonment.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the First Class Bench of Magistrates, Palghat, in Summary Trial No. 1389 of 1926.

A. V. Narayanaswami Aiyar for *C. S. Swaminathan* for petitioners.

K. N. Ganapathi for the Public Prosecutor for the Crown.

The Court made the following

ORDER :—The order of the lower court directing that petitioner should, in default of giving security, suffer simple imprisonment for one year, cannot be upheld on two grounds: (1) S. 123 contemplates that the accused shall be separately brought up for sentence if security is not furnished, that the Court should in its judgment fix a date for the furnishing of security, without any order for alternative imprisonment, and then if, by that date, accused has not furnished the security, he is to appear and receive sentence under S. 123; (2) it was wrong to fix a period of one year, since accused is entitled to be released from custody the moment he furnishes the security; the sentence ought to run "for one year or until such date within that year as the required security be furnished." As security appears to have been funished in this case, no further action is called for. I do not, as at present advised, subscribe to the conten-

*Crl. R. C. No. 76 of 1927. 20th July 1927.
(Crl. R. P. No. 68 of 1927).

Ibraya Rowthan, *In re.*

tion that a summary Court has no power to award, under S. 123, more than 3 months' imprisonment.

N. S. *No action necessary.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Muthusami Goundan ... *Appellant* in both the Appeals (7th Defendant—Plaintiff)*

v.

Palani Goundan and others ... *Respondents in S. A. No. 869 of 1924 (Plaintiff and defendants Nos. 1 to 6).*

Subbaraya Goundan and others ... *Respondents in S. A. No. 870 of 1924 (Defendants Nos. 1 to 8).*

Muthusami Goundan *v.* Palani Goundan.

Hindu law—Joint family—Member of—Sale by—Nominal transaction—Plea by other members of—Right of—Alienor himself not contesting the transfer—Alienor's share if passes under nominal sale.

In the case of a transfer by a member of a joint Hindu family purporting to be a sale, it is open to the other members of the family, notwithstanding that the alienor himself does not contest the validity of the transfer, to plead and prove that the so-called sale was merely a nominal transaction and that it did not operate to transfer even the share of the alienor himself.

The transfer by a co-parcener of his share permitted by the law in this Presidency is a transfer for valuable consideration, and does not extend to the case of a wholly inoperative transaction, as a nominal transfer, or to the case of a transfer which is to all intents and purposes a gift.

Second Appeals against the decrees of the Court of the 1st Additional Subordinate Judge of Coimbatore in A.S. Nos. 48 and 63 of 1923 (A. S. Nos. 13 and 78 of 1923 on the file of the District Court of Coimbatore), preferred respectively against the decrees of the Court of the District Munsif of Dharapuram in O. S. Nos. 544 and 559 of 1921.

T. M. Krishnaswami Aiyar for appellant.

K. Periasami Goundar for respondents.

The Court delivered the following

JUDGMENT :—These two appeals are from the judgments in connected suits. The facts necessary for the disposal of these appeals are as follows. One Palani Goundan was the father of one Kavundai Goundan, who is the 5th defendant in O. S. No. 559 of 21. His sons are defendants 6 to 8. 5th defendant sold certain family property under Ex. B to

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*S. A. Nos. 869 and 870 of 1924. 30th March, 1927.

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defendants 1 to 4, who in their turn sold it to the plaintiff under Ex. C. The sale covered eight items. Plaintiff claimed that they were all the 5th defendant's properties at the time of the sale by him to defendants 1 to 4, that the 5th defendant had separated from his family and had got items 1 to 4 and 8 for his share and that as regards 5, 6 and 7 they were his self-acquisitions. The contest in the suits ranged round the question whether Palani Goundan was still joint with the 5th defendant and his sons, and whether items 5, 6 and 7 were the self-acquisitions of the 5th defendant. The lower appellate court has decided that there was no partition between Palani Goundan and his sons and that items 5, 6 and 7 are part of the joint family property. The findings must be accepted in second appeal.

The connected suit was by Palani Goundan to declare that the sales of joint family property under Exs. B and C did not bind him, and the judgment in that suit followed the judgment in the other.

In this Court the appellant in both appeals is the same, namely, the purchaser under Ex. C. In both suits Koundai Goundan, the vendor under Ex. B, remained *ex parte*. The contention here is that the lower appellate court ought not to have dismissed the appellant's claim in toto but should have held that the transfer of Koundai Goundan's own share in the joint family property to him was valid, it not having been contested by Koundai Goundan himself, that the other members of the joint family have no right to question that transfer, and that the lower appellate court ought therefore to have given the plaintiff a decree that the transfer of that share to him was valid and binding on the rest of the joint family.

But the lower courts concur that the sale under Ex. B by the 5th defendant to defendants 1 to 4 was a nominal transaction. The lower appellate court held that the plaintiff also paid no consideration under Ex. C; the first court held that the sale under Ex. C was for a grossly inadequate consideration but did not give a finding that it was nominal. The plea that these sales were nominal was of course not taken by Koundai Goundan himself since he was *ex-parte*, but they were taken by the other members of the joint family. The general point for consideration is whether, when a member of a joint family has purported to sell his share to a stranger and does not himself plead that the transfer was not a sale or that it was for no con-

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sideration, it is open to the other members of the family to put forward such pleas and prove that there was no sale or no consideration for the sale and thus retain that property for the members of the joint family, including the member who professed to sell it?

The right of a co-parcener of a joint family to sell his share is admitted by the law in this Presidency, but it is not an unrestricted right. It is restricted to a right to sell for valuable consideration. He is not allowed to make a gift of it. This law is founded on a rule of equity whereby a purchaser for value is to be allowed to stand in his vendor's shoes—The Privy Council decision in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1) and the Madras Full Bench case in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (2). It follows from this, that the mere assertion by an alienating co-parcener that he has sold his share for valuable consideration is not conclusive of that fact. Otherwise he might easily evade the law by styling as a sale what was in fact a gift. The fact that the sale is valid only if it is for valuable consideration carries with it as a corollary that the sale must be a real, genuine sale, and the mere word of the alienor is not the deciding factor on that point: *Rottala Ranganatham Chetty* v. *Pulicat Ramaswami Chetty* (3). The Privy Council decision in *Achal Ram* v. *Kasim Hussain Khan* (4) has been cited by the appellant but a study of that case shows that the challenge to the sale which was repelled by the P. C. did not come from the co-parcener of the alienor at all, so that the case does not help. The ruling in *Vadivelum* v. *Natesam* (5) does not in my opinion carry the general principle any further. It in fact reiterates the proposition that such sales are only binding when they are for valuable consideration.

It follows that it is open to the other members to aver and prove that an alienation by a co-parcener was not a sale for valuable consideration, but was to all intents and purposes a gift. I think, therefore, that, in spite of the fact that the 5th defendant did not himself challenge Ex. B, it was open to the other members of the joint family to do so, and that if they were able to prove, as they have proved, to the satisfaction of the Court which is the final arbiter on this question of fact,

1. (1879) L R 6 I A 88 : I L R 5 C. 148 at 166 (P C).
2. (1902) I L R 25 M 690 at 715 (F B). 3. (1903) I L R 27 M 162 at 166.
4. (1904) I L R 27 A 271 at 289 : 15 M L J 197 (P C).
5. (1912) I L R 37 M 435 at 437 : 23 M L J 256.

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that the sale Ex. B was nominal, that sale must be held to be wholly nominall and will not suffice to transfer even the share of the aliener himself. The sale therefore by the 5th defendant was not a sale for valuable consideration and therefore cannot be given any effect over joint family property. I can therefore see no reason to interfere and I dismiss both these appeals with costs.

(*Note*).—This judgment does not decide and is not intended to decide whether the plaintiff is entitled to a charge on the property to the extent of Rs. 1,000 said to have been paid by him towards the mortgage decree. As the alleged payment was made after the suit was filed, the matter cannot properly be disposed of in the suit. Plaintiff is at liberty to take such action as he is advised to do to establish this claim.

A. S. V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MADAVAN NAIR AND MR. JUSTICE CURGENVEN.

Kasivajjala Ramaswami and another .... *Appellants** (*Plffs.* 1 *and* 3—*Petrs. Nos.* 1 *and* 3).

v.

Boddu Veeranna and others. ... *Respondents* (*Defts.* 1 *to* 5 *and* 22—*Cr. Petrs.*).

Ramaswami v. Veeranna.

Limitation Act, Art. 182 (5)—*Step-in-aid of execution—Application amounting to—Test—Application by decree-holder for extension of time to file encumbrance certificate, if a step-in-aid of execution.*

An application by a decree-holder for extension of time to file an encumbrance certificate is not a step-in-aid of execution within the meaning of Art. 182 (5) of the Limitation Act.

An application to amount to a step-in-aid of execution within the meaning of the clause should be one asking the Court to take some step in furtherance of execution of the decree.

Appeal against the order of the Court of the Subordinate Judge of Kistna at Ellore, dated the 6th day of February, 1925. in Appeal No. 224 of 1924, preferred against the order of the Court of the District Munsif of Kovvur, dated the 19th day of August, 1924, in E. P. No. 405 of 1924 (O. S. No. 854 of 1910 on the file of the Court of the District Munsif of Tanuku).

P. Somasundaram for appellants.

P. Venkataramana Rao and *A. Satyanarayana* for respondents.

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*C M S A No. 87 of 1925. 29th July 1927.

Ramaswami v. Veeranna.

The Court delivered the following

JUDGMENT :—The question for decision in this case is whether an application by the decree-holder for extension of time to file an encumbrance certificate can be said to be a step-in-aid of execution within the meaning of Art. 182, cl. (5) of the Limitation Act. In *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) it was decided that a statement by a decree-holder objecting to the judgment-debtor's application to enter up satisfaction is not a step-in-aid of execution. Applying the principle of that decision we must hold that the present application does not amount to a step in aid of execution, as "it does not ask the Court to take any step in aid of execution." The decision in *Hamid-Udin Sahib* v. *Ghouse Sahib* (2) is an express decision on the question before us. There it was decided that an application like the present one cannot be said to be a step-in-aid of execution. In that case, reliance was placed upon the decision in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) and also on the decision in *Krishna Pattar* v. *Seetharama Pattar* (3), which, following *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1), again held that the filing of a statement by a decree-holder objecting to the judgment-debtor's application to record satisfaction of the decree is not a step-in-aid of execution. In *Hamid-Udin Sahib* v. *Ghouse Sahib* (2) all the cases which have been now cited before us have been noticed.

Two decisions were specially relied upon by the appellant, namely *Abdul Kader Rowther* v. *Krishnan Malaval Nair* (4) and *Kunhi* v. *Seshagiri* (5). No doubt the decision in *Abdul Kader Rowther* v. *Krishnan Malaval Nair* (4) to the effect that an application to adjourn the case for the production of evidence amounts to a step-in-aid of execution does support the appellant; but this case was subsequently dissented from in *Masilamani Mudaliar* v. *Sethuswami Aiyar* (6) by Ayling, J. The decision in *Kunhi* v. *Seshagiri* (5) in view of the special facts of that case does not support the appellant's arguments. There, it was found necessary that an order should be obtained from the Court for the purpose of proceeding with the execution of the decree and when the petitioner asked the Court to issue such an order it was held that the application containing that request

1. (1921) I L R 45 M 466 : 42 M L J 303.
2. (1926) 24 L W 498 : 51 M L J 489.
3. (1926) I L R 50 M 49 24 L W 488 : 51 M L J 480.
4. (1913) I L R 38 M 695 : 26 M L J 433.
5. (1882) I L R 5 M 141. 6. (1916) 41 M 251 : 32 M L J 219.

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amounted to a step-in-aid of execution. This case has been explained in the decision in *Krishna Pattar* v. *Seetharama Pattar* (3).

The decision in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) has been followed not only in the two Law Weekly cases already referred to but also in *Balagurusami Naicken* v. *Guru-Swami Naicken* (7). It would thus appear that our Court has fairly cconsistently held that an application to amount to a step-in-aid of execution within the meaning of Art. 182, cl. (5), should be one asking the Court to take some step in furtherance of the execution of the decree. The only decision which appears to us to hold a contrary view is the one in *Abdul Kadar Rowther* v. *Krishnan Malaval Nair* (4). *Ravur Munusami Naidu* v. *Pandala Muthial Naidu* (8) simply follows this decision. As we have already pointed out, *Abdul Kadar Rowther* v. *Krishnan Malaval Naiar* (4) has been dissented from in *Masilamani Mudaliar* v. *Sethuswami Aiyar* (6). The trend of the decisions of our Court is in support of the view held in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1). We think that decision so far as it relates to the point argued before us lays down the correct principle.

Lastly, it was brought to our notice that the decision in *Rajendra Lal Saha* v. *Abdul Karim Abu Ahmed Ghusnavi Chaudhury* (9) is in favour of the appellant, but a perusal of that judgment makes it clear that no clear principle is enunciated in it. In these circumstances we hold, applying *Kuppusami Chettiar* v. *Rajagopala Aiyar* (1), that the decision of the learned Judge of the Court below that an application for extension of time to file an encumbrance certificate is not a step-in-aid of execution is right and that the appellant's application is barred by limitation. This appeal is dismissed with costs.

A. S. V. *Appeal dismissed.*

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1. (1921) I L R 45 M 466 : 42 M L J 303.
3. (1926) I L R 50 M 49 : 24 L W 488 : 51 M L J 480.
4. (1913) 38 M 695 : 26 M L J 433.
6. (1916) I L R 41 M 251 : 33 M L J 219.
7. (1924) 48 M L J 506.
8. (1916) 33 I O 79.
9. (1922) 27 C W N 505.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE MADHAVAN NAIR.

Yahya Ally Saheb and another ... *Appellants** (*Plaintiffs*)

v.

The Secretary of State for India in Council, represented by the Collector of Nellore ... *Respondent* (*Defendant*).

Yahya Ally Saheb *v.* The Secretary of State.

Madras Irrigation Cess Act (VII of 1865)—Inam—Whole inam village—Extension of irrigated area beyond that mentioned in the Inam Register—Water-cess in case of—Levy of—Legality—Conditions.

With regard to the rights of free irrigation depending upon the implied undertaking between the Government and the grantee of the land, an inamdar, a mittadar and a Zemindar all stand on the same footing.

Engagements arising out of inam settlements are engagements contemplated by Madras Act VII of 1865 just like the permanent settlement sanads.

The general principles underlying the decision of the Judicial Committee in the *Urlam case* should be applied to the case of an inam as well, at any rate, to the case of a major inamdar.

Held, therefore, that, in the case of a whole inam village, the inamdar was not liable to be charged with water-cess for any excess area of land cultivated over and above that mentioned in the inam register unless he took more water from the Government tank than he used to take from it at the time of the grant.

Per Ramesam, J. :—Where a certain easement is granted, there are two ways of increasing cultivation without enlarging the easement. One by a more economical use of the water The second method is by improving the capacity of the tank and by conserving water which might otherwise have overflowed. In either case, so long as the easement itself has not been enlarged, the extension of irrigated lands does not justify the Government imposing water-cess.

Second Appeal against the decree of the District Court of Nellore, dated 14th March, 1923, in A. S. No. 232 of 1922 preferred against the decree of the Court of the Additional District Munsif of Nellore, dated 10th September, 1921, in O. S. No. 1 of 1921.

S. Varadachariar for appellants.

The Government Pleader (*C. V. Anantakrishna Aiyar*) for respondent.

The Court delivered the following

JUDGMENTS :—*Ramesam, J.* :—This second appeal arises out of a suit for a declaration that the defendant is not entitled to collect any water-rate, road-cess or other cesses in respect of

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*S. A. No. 314 of 1924. 10th March, 1927.

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any of the plaintiffs' lands in the village of Bhuj Bhuj, Nellore, irrigated under Lingala Cheruvu and Patha Cheruvu.

The defendant, the Secretary of State for India in Council, is entitled to impose water-cess under Act VII of 1865 (the Madras Irrigation Cess Act), when certain conditions are fulfilled, but road-cess is levied by the District Boards under the Local Boards Act of 1920 and not by the Secretary of State for India in Council. So far as the suit relates to the road cess, the suit does not lie and must be dismissed, except as to any increment in the road-cess consequent on the imposition of water-cess. But the second appeal was argued only in respect of water-cess.

The District Munsif gave a decree. On appeal the District Judge reversed the District Munsif's decision and dismissed the plaintiffs' suit. The plaintiffs have filed this second appeal.

The history of the village seems to be somewhat as follows: The village was granted originally as a personal grant burdened with jodi and afterwards at about the time of the permanent settlement the jodi itself was remitted by Mr. Travers and the inam converted into a charitable inam; in the inam settlement of 1862, the inam was dealt with as a Dharmadayam inam which was to be held free of quit-rent so long as a choultry called the *Kumundan* (vernacular corruption of Commandant) choultry situated on the road to Madras is maintained properly. In the Government order, dated 1st September, 1913 (Ex. IV), there are a number of papers which show its earlier history. The facts above set forth by me appear from the Collector's letter and it was then supposed that the assessment alone constituted the inam. These particulars also appear from the inam statement, a translation of which also appears in the same papers, and show the date of the second grant by Mr. Travers to be 24th August, 1803. There is an inam register, which bears endorsements dated 1861 and 1864, appearing as an enclosure in the same Government Order, from which it appears that the total extent of the village was entered as 523.04 acres. Its assessment was put down as Rs. 400. This apparently has not been made from actual calculation but is a rough estimate at a round figure. Column 10 shows that it should be held so long as the repairs are performed and the choultry is maintained. Column 11 shows that it was granted by Mr Travers in 1803. This was

in 1861. Some time after, a portion was taken up for the trunk road and so a reduction was made. After the necessary reductions were made, the area of the village appears to have been 518.85 acres and the assessment Rs. 380-15-5. This was in 1864. Of the total area 94.49 acres appear as wet. The title deeds are not forthcoming. But as the lands changed hands, it appears that the appellants are not responsible for the non-production of the title-deeds. This is immaterial.

The contents of the inam title-deed correspond to the contents of the register and we may presume that the figures in the inam register also appeared in the title-deed. The learned Government Pleader's contention is that the inamdar is not entitled to irrigate, free of water-cess, any excess beyond the 94.49 acres, mentioned in the register. The Government Order above referred to, namely Ex. IV, says that the present extent of the village is 685.56 acres, and as it is not contended by the other party that the boundaries of the village have changed, the discrepancy between the old measurement of 1864 and the measurement of 1913 must be attributed to the use of an inaccurate unit and rough methods of survey in 1861. In the absence of any light thrown on the matter, it must be assumed that the inaccuracy has affected every part of the village uniformly. This is the principle adopted by their Lordships, Benson and Miller, JJ., in A S. Nos. 182, 183 and 184 of 1904 (*vide* Judgment, dated 1st May, 1908). On this supposition the 94.49 acres mentioned in the inam register would correspond to $\frac{94{\cdot}49 \times 685{\cdot}56}{518{\cdot}85}$ or 124.85 acres now. The descriptive memoir, Ex. I, shows 120 acres as wet. But even then the plaintiffs are irrigating more lands as wet lands. Ex. VIII-*a* and IX-*a* show that for Faslis 1323 and 1324 the extent of wet land under Patha Cheruvu was 140.69 and 141.09 acres respectively. The question therefore still arises whether the excess beyond 124.85 acres (or beyond 94.49 if the method of proportionate increase is not adopted) is entitled to free irrigation. In appeal before the District Judge the Government gave up their contention with respect to the lands under Lingala Cheruvu and the second appeal has been argued only with reference to the lands under the Patha Cheruvu.

Now the contention of the Government Pleader is as I have already stated that the inamdar is entitled to irrigate free of water-cess only to the extent stated in the inam register or title-deed. In the first place, in some obvious directions this

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argument seems to be a little too much. For instance, there is no information available as to how much of the extent mentioned in the inam register was under Patha Cheruvu and how much under Lingala Cheruvu. Only the total is mentioned as 94.49 acres; whether we take the old correct extent to be 125.84 acres or 94.49, there is an increase of wet cultivation in the village. In fact the total wet area in 1913 is shown as 224.48 acres though so much was not actually cultivated in 1913 and 1914. The increase must have been in respect of the lands under Lingala Cheruvu. This means that though there is an increase of cultivation and there are now more wet lands under Lingala Cheruvu, the Government do not seek to impose water cess in respect of these lands and the extent of wet lands as entered in the inam register is immaterial. This shows that the extent mentioned in the register or the deed is realy not entitled to that extreme significance which is sought to be attached to it by the Government Pleader. His contention is that the inam lands must be distinguished from Zamindary lands and that the principles laid down by the Privy Council in the *Urlam case, Prasad Row* v. *The Secretary of State for India* (1), are not applicable to inams. Zamindary lands were permanently settled in 1802 under Regulation XXV of 1802, the Government reserving only the peishcush, and inams were settled under the inam settlement in 1860 to 1864 and the claim of the Government over all the inams in the Presidency was fixed (known as Quit Rent). Their Lordships of the Privy Council in the *Urlam case* dealt also with inams. Though the inams in that case were inams within a Zamindary they say that the inamdar can rely on the same engagement to the same extent as could a tenant of Zamindary-land authorised by the Zamindar to use the water. There is no Zamindary within which the suit inam is situated. Here the engagement was directly with the inamdar. In the matter of considering the effect of the engagement the same principles ought *prima facie* to apply to the engagements implied in the inam settlement as to the engagements implied in the permanent settlement. In every case we have merely to estimate the effect of the grant of easement and nothing turns upon either the time of the grant or the particular tenure under which the lands are held by the land-holder. It is said by the Government Pleader that in India the Government have by common

1. (1917) L R 44 I A 166 : 40 M 886 : 33 M L J 144 (P C).

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law the right of assessing every parcel of land to Government revenue [Vide *Boddupalli Jagannadham* v. *The Secretary of State for India in Council* (2)] and that when they exercised that right in 1862 by imposing certain amount of quit rent on a certain area of wet land they did not exercise their right over the remaining lands on the footing of wet land and if the inamdar has since been converting them into wet lands, imposition of water cess is the only means of re-adjusting the rights of Government. But exactly the same argument will apply to Zamindary lands. It may be that in 1802 only a certain area was irrigated as wet. Merely because the extent of wet land has increased, the Government is not entitled to increase the *peishcush* or impose fresh water rates so long as the easement granted has not been exceeded. A Zamindar is entitled to make full use of the easement for the development of his Zamindary. The possibility of improving cultivation of lands was of course considered at the time of the settlement. The policy was to encourage such improvement. See *Prasad Rou* v. *The Secretary of State for India* (1). The same considerations apply to inams. In the case of inams also quit rent was fixed for them and was not intended to be altered. The Inam Settlement was as much a great Act of State as the permanent settlement and was so described by the Privy Council in *The Secretary of State for India in Council* v. *The Maharajah of Babbili* (3). To say that the inamdar cannot irrigate more than the extent of land mentioned in the register free of water cess is really inconsistent with the concessions made by the Government in respect of the excess lands under Lingala Cheruvu. Apart from this, let us look at the facts of this particular case. The tank, Patha Cheruvu, in the suit village seems to have its main supply from a hill stream known as Udumalavagu which rises in Government land and until it comes to the suit land passes through Government land and therefore can be regarded as a Government source of irrigation. At a particular place it bifurcates and one of the branches goes to the suit village and is not intended for any other village. The District Judge in appeal finds that possibly the capacity of the tank must have been increased, otherwise a larger extent of land could not have been brought under cultivation. We are bound to accept this in Second Appeal as a finding of fact. But it is not suggested, nor has it been found, that the width of the branch lead-

1. (1917) L R 44 I A 166 : 40 M 886 at 906 and 907 : 33 M L J 144 (P C).
2. (1903) I L R 27 M 16. 3. (1919) L R 46 I A 302 : 37 M L J 724 (P C)

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ing to the suit village from the point of bifurcation was increased or that any changes were made at the point of bifurcation so as to draw more water in this branch than before. So long as nothing has been done to increase the measure of the easement at the point of bifurcation, it seems to me that any improvement in the capacity of the tank is really immaterial. If the tank holds more water by its bunds being raised now, it only means that water which would have flowed through the branch channel intended for the suit village, but which might have overflowed the tank because the bunds were not high enough to hold it, is now kept in the tank, and not that more water is drawn through the branch channel. So long as the easement is not enlarged, even if more water is conserved, it seems to me that the Government is not entitled to impose water cess. The hill stream, the branch channel and the tank in this case correspond to the Vamsadhara river in the *Urlam case*. In the language of the Privy Council, "The Government could not complain if the amount of water taken were within this limit." Where a certain easement is granted there are two ways of increasing cultivation without enlarging the essement. One is by a more economical use of water. This was recognised in *The Secretary of State for India in Council* v. *Swami Naratheswarar* (4), and also in *The Secretary of State for India in Council* v. *Ambalavana Pandara Sannadhi* (5). The latter decision was confirmed by the Privy Council in *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India in Council* (6) following the *Urlam decision* in *Prasad Row* v. *The Secretary of State for India* (1). The second method is by improving the capacity of the tank and by conserving water which might have otherwise overflowed. It is possible that this has happened in this case on the Judge's finding of fact. But as I have already observed this does not involve an extension of the easement and so long as the easement itself has not been enlarged, that is, so long as the water which might have flowed through the branch channel is not increased, apart from such variations as may be due to larger rainfall in one year and smaller rainfall in another year, the extension of irrigated lands does not justify the Government imposing water cess. The learned Government Pleader relied on the decision in *Chidambra Row* v. *The Secretary of State for India in Council* (7), which is cited also by the

1. (1917) L R 44 I A 166 : 40 M 886 : 33 M L J 144 (P C).
4. (1910) I L R 34 M 21 : 20 M L J 766 5 (1910) I L R 34 M 366.
6. (1917) I L R 40 M 909 (P C). 7. (1902) I L R 26 M 66.

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District Judge. In that decision at page 69 there is a remark:

"It was the duty of the Inam Commissioner to ascertain and record in the title deed, not the extent of the land which was actually under wet cultivation at the time of the inam settlement but only the extent to which the inamdar was entitled to supply of water free of charge".

I do not know on what materials this sentence was based. With great deference to the eminent Judge who made this statement, I doubt if there is anything in the nature of the inam enquiry which justifies it. It was the duty of the Inam Commissioner to ascertain the assessment so that the quit rent to the Government may be fixed, and for the purpose of ascertaining the assessment it may be necessary to enquire how much was wet and how much dry, and as to the wet lands irrigated with water from a Government source of irrigation, how much was cultivated with such water, free of charge; but where the entry is very general, *i. e.*, so much land wet and so much dry, I doubt if it had anything to do with the question of irrigation free of charge. Anyhow, the observations must be confined to the facts of the particular case. In that case it was a small inam situated in a village which was being irrigated by the Kistna anicut water and any increase of irrigation by an inamdar must necessarily deprive some other ryotwari holders or other inamdars of their accustomed supply of water and in that way enlarged the easement. In that case there can be no possible suggestion of increase in the extent of irrigated land not being followed by an increase in the easement. It was not the case of a tank which was the sole source of irrigation for one whole village or a branch channel irrigating one village. The water in the Kistna and Godaveri anicuts is distributed to several villages through a system of channels under the control of the Government, and where any land-holder uses more water than was allotted to him by the Government he must necessarily trespass upon the rights of some other inamdar or landholder. There being no possibility in that case of the easement solely granted for the inam being enlarged within the limits within which he could irrigate his lands to a larger or smaller extent as he likes, the observations of the learned Judges were justified on the facts. Anyhow we must consider that case, if it is intended to lay down anything, in the light of the decision in the *Urlam case*. I am unable to distinguish the second appeal before me, on principle, from the decision of the Privy Council. Following it I allow the appeal, reverse the

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decision of the District Judge and restore that of the District Munsif with costs here and in the lower appellate court.

Madhavan Nair, J. :—The plaintiffs are the appellants. They are the inamdars of a whole inam village called Bhuj Bhuj in Nellore taluq. Originally the inam was a personal grant burdened with a jodi, but it was converted into Dharmadayam by Mr. Travers in 1803 by remitting jodi. At the time of the inam settlement this inam was confirmed in the names of the ancestors of the plaintiffs and a title-deed was given to them. In the Register of Inams the following entries appear as against this inam:

	acres	*cents.*
Dry	270	65
Wet	96	58
Garden	0	78
Poramboke	155	3

"This is followed by the statement ... ...

"The present income is less as the extent of the present wet cultivation is less. ... ...
The extent will be entered in the title deed." The *Survey Register* shows a large extent of wet waste land, which though wet was not actually cultivated at the time of the settlement. The lands of this village were cultivated by the inamdars with water taken from a tank called Patha Cheruvu. The Tank Memories show an ayacut of 120 acres under this tank. Patha Cheruvu is fed by a stream flowing through the Government forest in Nellore Amancherla. The entire bed of the tank belongs to the Government, but its bund belongs to the inamdars. In Fasli 1323 the extent of wet cultivation carried on by the inamdars with water taken from the Government tank was 146 acres 96 cents and in fasli 1324, 141 acres 9 cents. This extent of wet cultivation being in excess over the extent mentioned as wet land in the Inam Register, viz., 96 acres 58 cents, the Government attempted to levy on the inamdars water rate for cultivating this extra area. This second appeal arises out of a suit instituted by the plaintiffs for a declaration that the defendant, *i. e.*, the Government, is not entitled to levy water cess on the lands irrigated under Patha Cheruvu and for an injunction restraining the defendant from collecting water rate for faslis 1323 and 1324 and for subsequent faslis. The contention of the defendant is that the plaintiffs are entitled to free irrigation only to the extent of 96 acres 58 cents noted in the

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Inam Register and that for cultivating any land in excess of this area with water taken from the tank they are bound to pay water rate.

On the main contention raised in the pleadings, the District Munsif found that the supply channel and the Patha Cheruvu tank, the sources of irrigation for this village, belong to Government, that the plaintiffs did not divert any water to the supply channel from the adjoining channel as was contended for by the defendant, that the capacity of the tank had not been in any way increased by the plaintiffs, that there was no evidence that more water was being taken by the plaintiffs from the tank and that the increased extent of cultivation was due to the thrifty use of water made by the plaintiffs. It was conceded in the course of arguments that the plaintiffs had somewhat raised the height of the bund of the tank, which they had a right to do as the bund belonged to them, and that probably due to the silted condition of a connected channel supplying water to the adjoining Nellore tank more water was flowing into the stream supplying Patha Cheruvu. It was also found by the District Munsif on the evidence of D. W. 1, the Tahsildar of Nellore, that "the water from Patha Cheruvu irrigates only the lands in Bhuj Bhuj, Nellore, and is intended only for these lands." The learned District Judge agreed with the District Munsif in all his findings except the one regarding the capacity of the tank. On this he found that its capacity had increased and that now more water was stored in it. Even making allowance for the economic use of water and the improvement in the plug of the sluice which prevented wastage, the District Judge was of opinion that without increasing the capacity of the tank the large extent of land in question could not have been brought under cultivation. But it may be mentioned—and this fact has not been disputed—that the plaintiffs have not interfered in any way either with the supply channel or with the tank except by increasing the height of its bund by a few feet.

In the circumstances found by him, the District Munsif held that the principle of the *Urlam decision* in *Prasad Row* v. *The Secretary of State for India* (1) applied to the facts of this case and that the Government is not therefore entitled to levy water rate for the excess area cultivated by the plaintiffs. The District Judge held that the decision in *The Urlam* case, *Prasad Row* v. *The Secretary of State for India* (1) is inappli-

1. (1917) L R 44 I A 166 : 40 M 886 : 33 M L J 144 (P C).

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cable and that this case is governed by the decisions in *Chidambara Rao* v. *The Secretary of State for India* (7) and the *Secretary of State for India in Council* v. *Ramanuja Jeer Swamigal* (8), following which, he upheld the contentions of the Government.

The question for our consideration is whether, in the circumstances found by the lower court, the Government is entitled to levy water rate for the excess area of land (viz., the area over and above 96 acres 58 cents) cultivated by the plaintiffs with water taken from the Patha Cheruvu. I may state at once that, in my opinion, the finding of the District Judge that the storage of the tank had increased does not in any way affect the decision of this question, in view of the admitted fact already mentioned that the plaintiffs have not in any way interfered with the supply channel of the tank and, what is most important of all, the fact that there is no evidence to show that more water is now being taken by the plaintiffs for irrigation.

In support of its right to levy water rate, the Government relies upon S. 1 of Act VII of 1865. Under this section, whenever water is supplied or used for purposes of irrigation from any river, stream or channel belonging to or constructed by the Government, the Government is entitled to levy a separate cess for such water, provided the zamindar or the inamdar, whose land is so irrigated, is not entitled, by virtue of engagements with the Government, to irrigation free of separate charge. In order to justify the cess under this Act, it must be made out that the irrigation was caused by water supplied or obtained from a river or stream belonging to the Government. In this case the concurrent finding of the lower courts show that Patha Cheruvu and the stream belong to the Government and, therefore, the water for irrigation is supplied from a Government source. Under the Act, exceptions from the levy can be claimed if the claimants can show engagements with the Government under which they are entitled to irrigation free of of separate charge. The law is well settled that permanent settlement sanads and engagements arising out of inam settlements are engagements contemplated by Act VII of 1865. As regards the precise extent to which the zamindars and inamdars were entitled to claim exemption under the cover of these engagements, viz., as to whether the right of free irrigation extended only to the extents specified in these engagements and

7. (1902) I L R 26 M 66. 8. (1915) M W N 636.

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to nothing more, there has been for a long time acute difference of opinion among the learned Judges of this Court. In *The Secretary of State for India in Council* v. *Perumal Pillai* (9), it was held that where there is no limitation in the grant itself, the proprietor is not entitled to an unlimited water supply. In *Chidambara Rao* v. *The Secretary of State for India* (7), it was held that an inamdar is not entitled to cultivate free of charge land which is in excess of what was under cultivation at the time of the grant. In *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* (10), *the Urlam case*, which was subsequently reversed by the Privy Council in *Prasad Rao* v. *The Secretary of State for India* (1), it was held that the only engagement which can be inferred from the permanent settlement is that the peishcush being fixed with reference to the area of the land then under cultivation no further charge for the use of water should be made in respect of that area, and that if any extent of land in excess of that area is cultivated by the aid of Government water, water rate could be levied in respect of that excess extent. In *The Secretary of State for India* v. *Janakiramayya* (11), Sankaran Nair, J., in an elaborate judgment dealing with the history of the permanent and inam settlements and the policy underlying such, controverted this view differing from Miller, J. In Letters Patent Appeal against his judgment reported in *The Secretary of State for India* v. *Janakiramayya* (12), Oldfield and Bakewell, JJ., (Sadasiva Aiyar, J., dissenting) upheld the views of Miller, J., and accepted the decision in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* (10). The latter decision was again followed by Sir Arnold White, C. J., and Ayling, J., in *The Secretary of State for India in Council* v. *Ambalavana Pandara Sannadhi* (5), but this was subsequently reversed by the Privy Council in *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India* (6), following *Prasad Row* v. *The Secretary of State for India* (1). In this satte of the law the Privy Council in the *Urlam case*, *Prasada Row* v. *The Secretary of State for India* (1), set aside the decision of this Court in *the Secretary of State for India* v.

1. (1917) L R 44 I A 166 : 40 M 886 33 M L J 144 (P C).
5. (1910) I L R 34 M 366. 6. (1917) I L R 40 M 909 (P C).
7. (1902) I L R 26 M 66.
9. (1900) I L R 24 M 279 : 11 M L J 117
10. (1910) I L R 34 M 295 : 20 M L J 823.
11 (1912) I L R 37 M 322 ; 24 M L J 365. 12 (1915) 29 M L J 289 (F B).

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Ambalavana Pandara Sannadhi (5). Stated shortly, in that case the main question was as regards the extent of the right of the Urlam Zamindar to cultivate the lands of his Zamindari with water taken from the Vamsadhara river which was lying contiguous to it. Their Lordships of the Privy Council pointed out that the permanent settlement was an engagement with the Government within the meaning of the proviso to S. 1 of Act VII of 1865, that the effect of the settlement was to vest the channels, with their head sluices and branch and subsidiary channels, and the tanks or reservoirs in the zamindaris, through or within whose zamindaris the same respectively passed or were situate, and to give the zamindar the right of easement of taking water from the river for irrigation purposes. The following passages in their Lordships' judgment describe the measure of this right at p. 904:

"Assuming that the Vamsadhara river belongs to Government, the case may be looked on in this way. The owner of a river and of contigous land, through which passes a channel constructed for irrigation purposes and supplied with water from the river, grants the contiguous land together with the channel. Obviously some right or easement of taking water from the river must pass. The only question is as to the measure of this right. In their Lordships' opinion, the right must be measured by the physical conditions, such as the size of the channel, or the nature and extent of the sluices and weirs governing the amount of water which enters the channel, and not by the purposes for which the grantor or his tenants have been accustomed to use water from the channel prior to the date of the grant. The water in the channels may never have been used by the grantor or his tenants at all, but it would be absurd to hold on that account that no easement or right of taking water from the river passed by the grant. The case would have been very different if the contiguous land had been granted reserving the channel".

Later on occurs the following passage at p. 907:

"There being no evidence whatever that more water is being taken from the river than would be justified by the sanads—construed as in their Lordships' opinion they ought to be construed, it follows that the appellants must succeed in respect of the jirayati lands on which the cesses in dispute were levied".

In the result, their Lordships declared that the rights of the zamindar of Urlam under the Urlam sanad to irrigate the Urlam estate from the channels in question or their branches are not limited by any mamool and that the zamindar should not be charged water-cess for the extra cultivation that he carried

5 (1910) I L R 34 M 366.

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on with the amount of water he was justified in taking from the river under the sanad.

In view of the findings in this case that the source of irrigation belongs to the Government and that there is no evidence to show that more water is being taken from the Government tank than would be justified under the inam settlement, it is argued by Mr. Varadachariar that the principle of the *Urlam decision* (1) would apply to this case as well and that, therefore, the Government is not justified in levying any water-cess. It appears to me that this contention is well founded; but it is urged by the learned Government Pleader that the decision in the *Urlam case* (1) is inapplicable to this case, as here we are dealing with the rights of an inamdar as against the Government and not with the rights of a zamindar, and further that that decision is based upon a construction of the permanent sanad in that particular case. These observations no doubt are true, but I cannot see how these affect the application of the general principle underlying the *Urlam decision* (1). The judgment of the Privy Council is not based upon any *special* or *distinctive* feature of the Urlam Zamindari Sanad. Their Lordships point out that the effect of the permanent settlement is to vest the channels, with their head sluices and branch and subsidiary channels, and the tanks or reservoirs in the zamindaris, through or within whose zamindaris the same respectively pass or are situate. And then they say, as will appear from the extract that I have already quoted, that, when such a grant or settlement is made, *some right or easement of taking water from the river must pass* and that right is measured by the physical conditions, such as the size of the channel, or the nature and extent of the sluices and weirs governing the amount of water which enters the channel. So long as the measure of this easement has not been enlarged by the grantee in any way, the Government cannot complain. This is the general principle underlying that decision. Inams are Government grants subject to quit-rents, and in some instances to services. The inam in the present case is said to be an ancient one and it was only simply confirmed in the names of the ancestors of the present owners at the time of the inam settlement. There is, therefore, no question of a new contract at the time of the settlement between the Government and the inamdar. It is admitted that engagements arising out

1. (1917) L R 44 I A 166 : 40 M 886 : 33 M L J 144 (P C).

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of the inam-settlements are engagements contemplated by Act VII of 1865 just like the permanent settlement sanads The inam title-deed has not been produced, but that does not in my view make it difficult to apply the principle of the *Urlam decision* (1) to this case. To use language similar to that employed by the Judicial Committee, when the owner of a tank and of contiguous land, in which are situated the sluices and channels for irrigation through which water passes, grants this contiguous land together with the sluices, etc., some right or easement of taking water from the tank must pass. It is obvious that such a grant involving such an easement must have been made when this inam was granted. Otherwise, seeing that the tank is reserved for the Government, it would be impossible for the inamdar to cultivate the land granted to him in inam. If this inference arising from the grant is not justified, it will be for the Government to disprove it by producing the title-deed to show the limitations of the inam grant. That has not been done in this case. It follows, therefore, that, so long as more water is not taken by the inamdar than he was taking from the tank at the time of the grant, he cannot be charged any water-cess for cultivating more land with the same amount of water. Though the liability of the inamdars to be charged with water cess under Act VII of 1865 for extended cultivation arose in the Privy Council case, their Lordships did not specifically deal with the question as it was thought for the special reason that the inams in that case were inams within the zamindary. Still their Lordships remark that, if the cess were levied upon her (appellant) as inamdar, she can rely on the same engagement to the same extent as could a tenant of zamindary land authorised by the zamindar to use the water...

With regard to the rights of free irrigation depending upon the implied undertaking between the Government and the grantee of the land, an inamdar, a mittadar and a zamindar have all been treated alike by this Court. See *The Secretary of State for India in Council* v. *Ambalavana Pandara Sannadhi* (5). In support of this statement three cases were cited: *Chidambara Row* v. *The Secretary of State for India in Council* (7), *Lutchmee Doss* v. *The Secretary of State for India* (13) and the *Urlam case* (10). When the respondent's vakil sought to distinguish these cases on the ground that the first two relate to

5. (1910) I L R 34 M 366 at p. 371. 7. (1902) I L R 26 M 66.
10. (1910) I L R 34 M 295 : 20 M L J 823.
13. (1908) I L R 32 M 456 : 19 M L J 470.

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inam villages and the last to a zamindari formed from Haveli lands, while the suit mitta was carved out of an ancient zamindari, the learned Judges stated,

"But it is difficult to see why the same principle should not be followed, the implied undertaking being based on precisely the same principle in the case of the zamindaris and inams".

This case, as already observed, was ultimately reversed by the Privy Council on the authority of its decision in the *Urlam case* (1). But these remarks of the learned Judges of this Court are interesting in that they show that they were prepared to treat a zamindar and an inamdar alike with respect to the right claimed regarding free irrigation. Their view as regards the measure and extent of that right was not accepted by the Privy Council. In my opinion, the engagements implied in the permanent settlements and the inam settlements with respect to the matter under consideration should be interpreted in the same manner and in the light of the same principle. Unless the Government proves that the right of cultivation is limited as alleged by it in any particular case by producing the title-deed, I think the general principles underlying the *Urlam decision* (1) should be applied to the case of an inam as well (at any rate, to the case of a major inamdar), and that an inamdar is not liable to be charged water cess unless he takes more water from the Government tank. Innes, J., rightly states the principle to be applied to cases like the present thus:

"Where a channel has been constructed by Government acting as the agent of the community to increase the well-being of the country by extending the benefit of irrigation, and, in pursuance of that purpose, a flow of water is directed to the villages designed to be benefited, it becomes simply a question upon the circumstances of the case whether there has not been a conveyance to such villages in perpetuity of a right to the unobstructed flow of water by the channel. Looking at the permanency of such works and to the permanency attaching to the object, that there *was* a transfer in perpetuity would seem an almost necessary conclusion, unless there were other circumstances to lead to one of an opposite character. It might of course be capable of being shown that the privilege was granted as a mere license, and that, before the water was allowed to flow to the villages, it had been left open to Government by arrangements then made to obstruct the flow at will at any future period." [See *Ponnuswami Tevar* v. *The Collector of Madura* (14)].

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1. (1917) L R 44 I A 166 · 40 M 886 : 33 M L J 144 (P C).
14. (1869) 5 M H C R 6 at 29 & 30.

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The decision in *Chidambara Row* v. *The Secretary of State for India in Council* (7), no doubt supports the respondent. One of the reasons mentioned as the basis of that judgment is this:

"It was the duty of the Inam Commissioner to ascertain and record in the title deed, not the extent of land which was actually under wet cultivatoin at the time of the inam settlement, but only the extent to which the inamdar was entitled to supply free of charge. . . . ."

We have not been referred to any authority justifying this statement. On the other hand, it has been understood that the duties of an Inam Commissioner consisted in ascertaining the necessary existing facts with regard to cultivation etc., for the purpose of enabling the Government to fix a proper quit rent while granting an inam. In this connection, the remarks of Sankaran Nair, J., regarding the construction of inam deeds and the interpretation of the entries therein in his judgment in *The Secretary of State for India* v. *Janakiramayya* (11) may well be referred to with advantage. As those remarks are apposite in the present context, I quote them here. Though his judgment was set aside in Letters Patent Appeal, it is interesting to note that their Lordships of the Privy in the *Urlam case* (1) arrived at the same conclusions as he did in *The Secretary of State for India* v. *Janakiramayya* (11) regarding the Government's right to levy water cess for extended cultivation in zamindary lands. The remarks are as follows:

"Moreover there is nothing in the title deeds or proceedings to show that the inamdar is only entitled to cultivate with channel water those lands entered as wet free of charge and that even those lands are entitled to exemption only for the first crop. Neither in the despatch from the Government of Madras to the Secretary of State, Revenue, dated 9th August, 1859, with the enclosures thereto giving full information of the intended proceedings to enfrancise inams, nor in the final report of Mr. Blair on the operations of the commission, dated 30th October, 1869, the proceedings of the Madras Government and the despatch of the Sectary of State thereon, dated 10th August, 1871, nor in the mass of records relating to the enfranchisement of inams is there any indication that it was the intention of the Government to advance any claim on account of any excess cultivation or that the inamdar's right was confined to the wet area mentioned in the title deeds. If this was so, the Government could very easily prove it without asking the Courts to upset a practice upon theories The available records support the contrary conclusion; when water was supplied from Government anicut works, no cess was levied on the mamool wet presumed to have been under wet cultivation at the time of the permanent settlement or the enfranchisement of the inams, but cess was

1. (1917) L R 44 I A 166 : 40 M 886 : 33 M L J 144 (P C).
7. (1902) I L R 26 M 66.
11. (1912) I L R 37 M 322 : 24 M L J 365 at pp. 388 & 389.

levied on water taken for the irrigation of the rest. That the claim was so restricted to water from Government works is not without significance. The copies of the inam title deeds show that the inam is only 'claimed to be of acres of dry land and acres of wet land'. All information had to be given in the registers as the assessment was fixed at the discretion of Government: no inference can be drawn therefore that any fact therein mentioned was the basis of any contract. In asking the Government to cancel their order that inams limited to a limited number of lives should not be interfered with, the Inam Commissioner said 'it is superfluous to add that in all such settlements every care is taken that the interests of Government do not suffer. A fair addition is made to the present value of the village *on account of the prospective improvement from the cultivation of waste lands*."

Perhaps it is possible to distinguish *Chidambara Rao* v. *The Secretary of State for India* (7), by noting the special facts that it is a case of a small inam, that possibly the source of irrigation in that case was common to many inamdars and ryotwari holders of lands and that increased cultivation by one inamdar meant necessarily enlargement of the easement enjoyed by him to the deteriment of the other inamdars. But in view of the Privy Council decision in *Prasad Row* v. *The Secretary of State for India* (1), I am inclined to think that the correctness of the decision in *Chidambara Rao* v. *The Secretary of State for India* (7) is open to question. The same may be said about the decision in *The Secretary of State* v. *Ramanuja Jeer Swamigal* (8) also. That decision is not of much use as it does not contain any discussion of the question under consideration. The decision in *The Secretary of State for India* v. *Srinivachariar* (15) relates to the question whether the full right to the quarries and minerals in a village granted as shrotriem inam passed to the grantee and the decision depended upon the true construction of that grant. It does not lay down any principle useful for the decision of this case.

The amount of quit rent to be paid by an inamdar being once for all fixed at the time of the Inam Settlement, it follows as in the case peishcush that the Government cannot by levying water cess increase that amount. In these circumstances, applying the decision of the Privy Council to this case I would hold that the Government is not entitled to charge water cess for the increased extent of land cultivated in their inam village by the appellants in faslis 1323 and 1324. I would therefore set aside the decree of the District Judge and restore that

1. (1917) L R 44 I A 66 : 40 M 886 : 33 M L J 144 (P. C.).
7. (1902) I L R 26 M 66. 8. (1915) M•W•N 636.
15. (1920) I L R 44 M 421 : 40 M L J 262 (P. C.).

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of the District Munsif with regard to the plaintiff's suit for a declaration and injunction as regards Patha Cheruvu with costs here and in the lower appellate Court; but as the Government is the defendant, it is not necessary—as it is not usual—to include in the decree the relief by way of Injunction.

A. S. V. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT :—LORD SHAW, LORD SINHA AND SIR JOHN WALLIS.

Gauri Shankar and others ... *Appellants** (*Defts.*)

v.

Jiwan Singh and others ... *Respondents* (*Plaintiffs*).

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Gauri Shankar v. Jiwan Singh.

Hindu Law—Joint family property—Sale for family necessity—Part of consideration not applied to purposes of necessity—Effect of.

A sale of joint family property will not be set aside merely because a part of the proceeds is not proved to have been applied to purposes of necessity. The real question that has to be considered is this:—Whether the sale itself was justified by necessity. If the purchaser has acted honestly, if the existence of a family necessity for the sale is made out, and the price is not unreasonably low, he (the purchaser) is not bound to account for the application of the price. "A certain practice appears to have crept up in the Allahabad High Court of investigating and settling these cases upon the principles of accounting. If, upon a strict accounting, it is found that, although it be completely established that by far the most substantial part of the consideration was for family necessity, yet if a certain balance of the price remains unaccounted for, or insufficiently proved, then by that result the parties' interests are to be judged, and the sale is set aside, conditionally upon the repayment by the vendor or his representatives of the substantial part referred to. Their Lordships think this practice to be erroneous". *Krishn Das* v. *Nathu Ram*, (1926) 54 I A 79 : 52 M L J 720 (P. C.), followed.

Transactions of sale of family property which, in their real essence and substance, are sales made for family necessity, will not be narrowly scrutinized, especially when such transactions have stood unchallenged for a considerable length of time and go back beyond the stage at which direct evidence could possibly be expected from the vendees.

Where a sale of family property for the sum of Rs. 4,000 was justified by necessity to the extent of Rs. 3,500 and there was an unaccounted balance of Rs. 500, the High Court held the sale invalid, subject to the condition of payment to the vendees of the items proved (namely, the said sum of Rs. 3,500). Held by the Judicial Committee (reversing the High Court) that the sale could not be set aside. "They (the Privy Council) take the case, even upon the footing, which might well be challenged,

* P. C. Appeal No. 64 of 1926. 28th July 1927.

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that Rs. 500 out of the price of Rs. 4,000 had not been fully accounted for. Granted that it was so, then the balance of Rs. 3,500 out of Rs. 4,000 is surely a justification of sale for a family necessity proved up to that amount".

Judgment of the High Court reversed.

[See also *Naimat Rai* v. *Din Dyal*, (1927) L R 54 I A 211 : 52 M L J 729 (P. C.).—K. J. R.].

Appeal (No. 64 of 1926) from a judgment and decree of the High Court, Allahabad (Lindsay and Kanhaiya Lal, JJ.), dated the 30th March, 1925, reversing a decree of the Subordinate Judge of Mainpuri, dated the 19th January, 1922, and decreeing the plaintiff's claim for possession of the property in suit subject to his paying into Court for payment to the vendees-defendants within three months from the 30th March, 1925, the sum of Rs. 3,457-14-8.

On the 26th February, 1910, Lal Singh, father, and Nawab Singh, uncle, of the plaintiff, sold the property in dispute to defendants Nos. 1 to 3 for a consideration of Rs. 4,000. The plaintiff alleged that the property in question was joint ancestral property and that it had been sold without legal necessity, and he brought the present suit on the 11th July, 1921, for possession of the property by cancellation of the sale-deed. The defence substantially was that the sale was for legal necessity. Three items went to make up the consideration of Rs. 4,000 recited in the sale-deed. The first item was one of Rs. 3135 left with the vendees for payment to a prior mortgagee. The second item of Rs. 65 was recited in the deed to have been paid to the vendors before the date of the execution of the sale-deed, and lastly, a sum of Rs. 800 in cash was said to have been paid to the vendors at the time of registration before the Sub-Registrar. The Subordinate Judge dismissed the suit, holding on the evidence that the entire consideration money was obtained for family necessity. With reference to the third item of Rs. 800, the Subordinate Judge said:—

"It is proved by the Auraiya treasury (register) called in by the contesting defendants that sums amounting to a total of Rs. 535. 2. 4. were paid by the vendors into the treasury about land revenue from the 2nd March 1910 to 15th August 1910. The balance out of Rs. 800 has not been very well accounted for, but in view of the fact that a very large portion of the consideration for the sale in question has been proved to have been required by the vendors for legal necessity and that there is not even an insinuation that either of the vendors had a bad moral character, I have no hesitation in holding that the entire consideration was obtained for family necessity. It is also to be considered that the suit has been brought long after the execution of the sale-deed when it is not easy for the ven-

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dees to adduce strong and perfectly satisfactory evidence about each item of the sale-consideration. I decide the issue in favour of the defendants-vendees".

The plaintiff appealed from the said decree to the High Court. The learned Judges of the High Court stated that the plaintiff's counsel had to admit that the sum of Rs. 3,135 was left for the discharge of the earlier mortgage and could not be impeached as that sum constituted an antecedent debt which was binding on the plaintiff. They agreed with the Subordinate Judge that the item of Rs. 65 also constituted legal necessity. With reference, however, to the item of Rs. 800, they did not concur in the view taken by the Subordinate Judge. They held that Rs. 257-14-8 out of that sum had been deposited in the Government Treasury on the 2nd of March, 1910, on account of land revenue. As to the other payments by Nawab Singh (vendor) into the Auraiya Treasury in July and August, 1910, on account of land revenue, the learned Judges were inclined to think that they were deposited on account of the *Rabi* instalment and disallowed these items apparently on the ground that the sale-deed recited that the executants had to pay the revenue for *Kharif*. They further held with reference to the balance of this item that it was the duty of the vendees or one of them at least to have entered into the witness-box and deposed as to his knowledge of the objects for which this money was taken, and that not having done so and the burden of proof being on the vendees they must take the consequences. They therefore found that legal necessity and antecedent debt were shown to have existed to the extent of Rs. 3,457-14-8. The learned Judges concluded their judgment as follows:—

"The balance which is unaccounted for is a sum of Rs. 500 odd and is a substantial amount. Following the practice, therefore, of this Court in cases of this kind, we think the proper line to take is to give the plaintiff a conditional decree. We therefore allow the appeal, set aside the order of the Court below and give the plaintiff a decree declaring that if he pays into Court for payment to the vendees within three months from the date of this decree the sum of Rs. 3,457-14-8, he will be entitled to possession of the property in dispute. If payment is not made within that time, his suit will stand dismissed. We do not allow the plaintiff any costs either here or in the Court below, but we direct that, if he fails to pay the sum above-mentioned within the period limited, the suit shall stand dismissed with costs in all Courts to the defendants-vendees".

The defendants-vendees appealed to His Majesty in Council from the said decree of the High Court.

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Wallach for the appellants:—The whole of the consideration money was paid for legal necessity.

Even on the finding of fact of the High Court that, out of the sale consideration of Rs. 4000, Rs. 3457-14-8 were for an antecedent debt and legal necessity, the plaintiff's suit ought to have been dismissed.

Sir John Wallis:—In *Krishn Das* v. *Nathu Ram* (1) the Board set aside a most extraordinary doctrine enunciated by the Allahabad High Court.

(*Lord Shaw* : The practice followed by the Allahabad Court was entirely wrong.)

The principle of *Krishn Das's judgment* (1) applies to the present case.

(*Sir John Wallis* : The Board have laid down that a sale will be upheld although the property is worth a little more than the consideration money. The mere fact that necessity is not proved for a small part of the consideration, cannot vitiate the sale. That is the underlying principle in such cases.)

The respondents were not represented at the hearing.

At the conclusion of the arguments of the appellants' Counsel, their Lordships' judgment (allowing the appeal) was delivered by

Lord Shaw

Lord Shaw :—This appeal concerns property which is undoubtedly family property. It was sold for family necessity, so alleged, at the price of Rs. 4,000. There is no allegation made upon the record, or suggested in any respect, that the property was sold for the payment of any debts for immoral purposes. The only question is as to family necessity.

A certain practice appears to have crept up in the Allahabad High Court of investigating and settling these cases upon the principles of accounting. If, upon a strict accounting, it is found that, although it be completely established that by far the most substantial part of the considedration was for family necessity, yet if a certain balance of the price remains unaccounted for, or insufficiently proved, then by that result the parties' interests are to be judged, and the sale is set aside, conditionally upon the repayment by the vendor or his representatives of the substantial part referred to.

It is manifest that this practice imperils transactions of sale which, in their real essence and substance, are sales made for family necessity.

1. (1926) L R 54 I A 79 : 52 M L J 720 (P C).

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The present case is interesting as illustrative of the point. It may be that in all cases of family necessity sums have been expended which, after a lapse of years, cannot be verified by entries in books or the like. It is therefore important to notice that in the present case the transaction of sale stood unchallenged for upwards of 11 years. The sale took place on the 26th February, 1910, and it was not until the 11th July, 1921, that this sale was put in challenge and the Court was asked to declare it void as not having been for family necessity.

In the course of the investigation, the case as to family necessity with regard to the major portion of the accounts was completely satisfied. Both Courts held that payment was made to extinguish a prior mortgage bond, and the amount due thereunder was Rs. 3,135. Both Courts further agree in holding that the Rs. 65 was paid to the vendors before the execution of the sale deed.

The Judge who tried the case stated his conclusion upon the largest item thus:—

"It is, therefore, celar that the bond of 17th April, 1906, was executed by Meharban Singh and his sons for family necessity".

He also makes the same clear statement with regard to the Rs. 65. As to the third item of Rs. 800, he holds it to be proved by the Auraiya Treasury, and its official who was called in, that sums amounting to a total of Rs. 535 were paid by the vendors into the Treasury before the 15th August, 1910. The small balance of between two and three hundred rupees, the learned Judge says, has not been very well accounted for; but, in view of the fact that a large portion of the consideration for the sale has been proved to have been required for legal necessity, he has no hesitation in holding that the entire consideration for the sale was such necessity. He adds this pregnant remark:

"It is also to be considered that the suit has been brought long after the execution of the sale deed, when it is not easy for the vendees to adduce strong and prefectly satisfactory evidence about each item of the sale consideration".

These views of the Subordinate Judge have the approval of their Lordships.

The learned Judges of the High Court, however, in accordance with the practice to which allusion has been made, state that on their estimate of the consideration for sale, they do not reach the conclusion that the entire amount of the Rs. 4,000 is proved to have been justified by necessity. They admit the bond and the item of Rs. 3,135 thereunder. They admit the

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payment of Rs. 65. They further give credit for the payment of certain Government and other dues exigible upon the property; but they consider that there is an unaccounted balance of Rs. 500. Having reached that amount, the learned Judges of the High Court then pronounce the sale invalid, subject to the condition of payment to the appellants of the items proved.

Their Lordships think this practice to be erroneous. It is to be noted that a judgment which finally summed up the entire law on this subject was pronounced by this Board on the 10th December, 1926, in the case of *Krishn Das and others* v. *Nathu Ram* (1). The judgment of the High Court had been given about twenty months sooner, namely, on the 30th March, 1925. In their Lordship's view, had the *Krishn Das* judgment been pronounced prior to the judgment of the High Court, that Court would have, in view of it, reached a different conclusion. In that case a considerable body of authority was considered by the Board; and the result was in substance that a sale of joint property will not be set aside merely because a part of the proceeds is not proved to have been applied to purposes of necessity. The real question that has to be considered is this: Whether the sale itself was justified by necessity. Their Lordships cannot go back upon that decision. If the purchaser has acted honestly, if the existence of a family necessity for sale is made out, and the price is not unreasonably low, he (the purchaser) is not bound to account for the application of the price. They, however, take the case, even upon the footing, which might well be challenged, that Rs. 500 out of the price of Rs. 4,000 had not been fully accounted for. Granted that it was so, then the balance of Rs. 3,500 out of Rs. 4,000 is surely a justification of sale for a family necessity proved up to that amount.

In those circumstances their Lordships will humbly advise His Majesty that this appeal should be sustained, the decree of the High Court set aside with costs, and that of the Subordinate Court restored. The first respondent (the plaintiff) will pay the costs of the appeal.

Solicitor for appellants : *H. S. L. Polak*.

K. J. R. *Appeal allowed.*

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1. (1926) L R 54 I A 79 : 52 M L J 720 (P C).

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WILLIAM PHILLIPS, *Officiating Chief Justice*, MR. JUSTICE BEASLEY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Veeraraghavachariar, late a minor by guardians, Rukmani Ammal and another, but now of full age ... *Appellant** (*Respt. No. 2 in M. P. No.* 150 *of* 1924 *in O. S. No.* 30 *of* 1921).

v.

The Advocate-General of Madras and others ... *Respondents* (*Petitioner and Respondents Nos.* 1, 5, 6, 7, 8, 9 *and* 10 *in do.*).

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Civil Procedure Code of 1908, *S.* 92—*Temple scheme settled by Court—Liberty to apply in—Reservation of—Propriety—Conditions—Liberty to apply to ask for directions as to carrying out scheme—Liberty to apply for modification or alteration of scheme—Reservation of—Validity—Conditions.*

Held by the Full Bench : the reservation in a temple scheme settled by the Court of liberty to a person or persons to apply for a relief which will come within S. 92 of Civil Procedure Code is *ultra vires,* but if such reservation does not offend in this way or against any other provision of law it may be useful or advisable for carrying out the provisions of the scheme already framed.

Per The Officiating Chief Justice:—Liberty to apply should be reserved in temple suits only when the Court is unable, or, for good reasons, thinks it advisable not to finally determine any questions arising for its decision but to leave such decisions for a future date. The reservation of liberty to apply to ask for directions as to carrying out the scheme may well be *intra vires,* unless it contravenes the provisions of S. 92, Civil Procedure Code, for the assistance of the Court is asked merely to carry out what it has already ordered, and if such assistance can be given without contravening the provisions of S. 92, there can be no objection to such a rule being framed; but when permission is given to apply to the Court for alteration or modification of the scheme, that at once offends against S. 92. The scheme having been framed, any modification or alteration of it is in effect a new scheme, and the power to frame a scheme is given only subject to the conditions specified in S. 92.

Appeal against the order of the Court of the Subordinate Judge of Chingleput, dated 6th December, 1924, and made in M. P. No. 150 of 1924 in O. S. No. 30 of 1921.

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*A. A. O. No. 442 of 1924. 1st September, 1927.

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T. M. Krishnaswami Aiyar and *T. E. Ramabhadrachari* for appellant.

P .R. Ganapathi Aiyar and *A. N. Krishna Aiyangar* for 1st respondent.

Watrap S. Subrahmania Aiyar for 2nd respondent.

S. Panchapagesa Sastri and *T. R. Srinivasa Aiyangar* for 5th and 6th respondents.

T. Rangachari and *R. Purushottama Aiyangar* for 9th respondent.

The Court (*Krishnan and Odgers, JJ.*), made the following.

Odgers, J.

ORDER OF REFERENCE TO A FULL BENCH :—*Odgers, J.* :—In O. S. No. 30 of 1921 on the file of the Subordinate Judge of Chingleput a scheme was settled on 3rd January, 1923, for the Devasthanam and shrines connected therewith of Sri Adikesavaperumal and Sri Bhashyakarlu Swami in Sriperumbudur. The scheme *inter alia* in paragraphs 99 and 100 provided as follows:—

"99. It shall be competent to the Advocate-General or the Collector of the district or the dharmakartas or either of them or any five worshippers to apply to the Court (1) to modify or delete any rule hereby promulgated, (2) framing of additional rules for the management of the Devasthanam and securing due administration of, or the protection of, the Devasthanam property, (3) for regulating the conduct of business in the Devasthanam and the worship in the shrines and the celebration of utsavams, (4) with reference to the framing of the budget, (5) for sale of broken or useless jewels or items of stock, for re-making or converting them, or for the purchase of new ones, either by way of addition or by way of replacement."

"100. It shall be competent to the Advocate-General or the Collector of the district or any five worshippers to apply to the Court for the removal of any dharmakarta who is charged as (1) subject to any of the disqualifications provided in R. 21, (2) guilty of misconduct, whereby his continuance as dharmakarta will be injurious to the Devasthanam, giving assignment of such misconduct."

In M. P. No. 150 of 1924, dated 31st July, 1924, in the above suit the Advocate-General moved to modify the scheme as there were disputes between the two trustees appointed under it. This was opposed. The first point taken before us is that the Subordinate Judge made no final order on the petition, but only gave a tentative expression of opinion and that therefore no appeal lay. To my mind the objection must fail. The Subordinate Judge says in paragraph 6 "In these circumstances I should think the scheme requires an amendment" and, in paragraph 8, "The scheme will be amended accordingly". This clearly shows that the Subordinate Judge had made up his mind to amend the scheme. It is said for the appellant

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that either S. 92, Civil Procedure Code, is a bar to an application of this sort by the Advocate-General in a scheme suit or that the suit came to an end with the settling of a scheme. The Court, therefore, had no jurisdiction to entertain the application of the Advocate-General and the clauses in the scheme giving him leave to apply are *ultra vires*. There is a direct authority for this view in *Abdul Hakim Baig* v. *Burramiddin* (1), where Devadoss, J., says at page 583:

"When a scheme is settled, the suit comes to an end. To say that any person could apply to alter the scheme once framed would necessarily mean that the suit is pending. It cannot be said that the suit is pending for all time from the mere fact that the scheme framed contains a provision that an application can be made for altering the scheme"

and again at page 584:

"When S. 92, Civil Procedure Code, directs that for the settlement of a scheme and for other reliefs the sanction of the Advocate-General should be obtained, it would be *ultra vires* of any Court to obtain jurisdiction by inserting a clause in the scheme whereby persons interested in the scheme or others are enabled to apply to the Court for the alteration of the scheme."

Wallace, J., was of the same opinion, at page 590,

"I am of opinion that S. 92 was intenedd to be enforced whenever any of the reliefs mentioned in it are asked for, whether or no a scheme has already been framed under it,"

though (at page 591) he concedes that this conclusion will compel worshippers to bring suits even for the most petty alterations in the original scheme, but that will only be for such alterations as are within the mischief of S. 92.

In a similar case in *Ranganatha Thathachariar* v. *Krishnaswami Thathachariar* (2), Oldfield and Venkatasubba Rao, JJ., held that no appeal would lie from an order directing the proper authorities to fill up a vacancy among trustees since it was not an order in execution of a decree.

There is no doubt that if the decision in *Abdul Hakim Baig* v. *Burramiddin* (1), is right, this appeal must be allowed, but we are by no means satisfied that it is so. There seems no reason on principle why worshippers and others interested should be driven to a separate suit every time an alteration in a temple scheme is required or why the well known advantages of reserving "librty to apply" so often availed of in England should not be applied here. Subrahmania Aiyar and Davies, JJ., in *Prayag Doss Ji Varu, Mahant* v. *Tirumala Srirangacharlavaru* (3), thought that S. 539 of the old Civil

1. (1925) I L R 49 M 580. 2. (1923) I L R 47 M 139.
3. (1905) I L R 28 M 319 : 15 M L J 133.

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Procedure Code conferred on Courts in this country the same powers as were possessed by the Court of Chancery at the time of its enactment, *e.g.*, the power to appoint additional trustees even though such appointment involved a departure from the arrangement contemplated in the constitution of the trust.

The learned Judges also held on the authorities that the High Court possesed in the matter of administration of public religious charities "the same practically unlimited jurisdiction as the Court of Chancerry." On appeal to the Privy Council. *Prayag Doss Ji Varu* v. *Tirumala Srirangacharalavaru* (4), the Judicial Committee themselves settled a scheme which (clause 10) reserved liberty for the Vicharanakartha or any person interested to apply to the District Court, with reference to the carrying out of the directions of the scheme.

In *Bhogilal* v. *The Dakore Temple Committee* (5), the Privy Council had confirmed a temple scheme of which clause 20 ran as follows:—

"The provisions of this scheme may be altered, modified, or added to, by an application to His Majesty's High Court of Judicature at Bombay."

Cf. the same case in *Shankarlal* v. *The Dakore Temple Committee* (6). In *Sakharam Daji* v. *Ganu Raghu* (7), a scheme had been settled in 1897 and the question whether the present suit (brought long after) was barred by S. 92 (2) was answered in the affirmative, but the Court said it was open to any one interested to apply to the Court which framed the scheme to supplement or modify it. It was not suggested that a separate suit was necessary and that though no liberty to apply is reserved under the scheme such a reservation can be always implied.

Further in *Manadananda* v. *Tarakananda* (8), the Court in framing a scheme had given liberty to any person interested to apply to the District Court with reference to the carrying out of the directions of the scheme and also to the High Court for any necessary modification of the scheme. Mookerjee, J., said:

"The principle on which these clauses were inserted in the decree was explained by this Court in the following passage of its judgment in the case of *Umeshananda Jha* v. *Rawaneswar Prasad Singh* (9) :—

4. (1907) I L R 30 M 138 : 17 M L J 236 (P C).
5. (1925) 49 M L J 25 (P C). 6. (1925) 28 Bom. L R 309.
7. (1920) I L R 45 B 683. 8. (1923) 37 C L J 281.
9. (1912) 17 C W N 841.

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"The authority of the Court to amend the scheme from time to time has not been and cannot possibly be questioned. As was pointed out by Mr. Justice Subramanya Aiyar in the case of *Prayag Doss Ji Varu Mohant* v. *Tirumala Srirangacharlavaru* (3) which was subsequently affirmed by the Judicial Committee in *Prayag Doss Ji Varu* v. *Tirumala Srirangacharlavaru* (4) there is ample authority for the proposition that a Court which has sanctioned a scheme for the administration of a charitable trust is competent from time to time to vary the scheme as exigencies of the case may require. Reference need only be made to the decisions in *Attorney-General* v. *Bovell* (10), *Attorney-General* v. *Bishop of Worcester* (11), *Mayor of Lyons* v. *Advocate-General of Bengal* (12) and *Re. Browne's Hospital, Stamford* (13)".

Finally a Bench of three Judges of this Court in C. S. No. 527 of 1924 (the Triplicane Temple case) sanctioned (clause 36) liberty to apply under certain conditions. With this body of authority against the view taken in *Abdul Hakim Baig* v. *Burramiddin* (1), and with the express authority of the Privy Council in two cases mentioned above, where the power to reserve liberty to apply appears to have been assumed without question or hesitation, we are not prepared to follow the ruling in *Abdul Hakim Baig* v. *Burramiddin* (1), unless it is confirmed by the Full Bench. We have therefore decided to refer the following question to the Full Bench:

"In a temple scheme settled by the Court where liberty to apply is reserved to a person or persons (*a*) to ask for directions as to carrying out the scheme or (*b*) to move the Court for alterations or modifications of the scheme—is this reservation *intra vires* of the Court or is a separate suit necessary either under the provisions of S. 92, Civil Procedure Code, or on the ground that the suit has come to an end and the Court therefore *functus officio*" as decided in *Abdul Hakim Baig* v. *Burramiddin* (1).

Krishnan, J.

Krishnan, J.—I agree.

T. M. Krishnaswami Aiyar and *T. E. Ramabhadrachari* for appellant.

P. R. Ganapati Aiyar for 1st respondent.

Watrap S. Subramania Aiyar for 2nd respondent.

T. R. Srinivasa Aiyangar for 5th and 6th respondents.

T. Rangacharri and *R. Purushottama Aiyangar* for 9th respondent.

1. (1925) I L R 49 M 580. 3. (1905) I L R 28 M 319.
4. (1907) I L R 30 M 138 : 17 M L J 236 (P C).
10. (1840) I Phillip 762 : 65 R R 506.
11. (1851) 9 Hare 328 : 68 E R 530.
12. (1876) L R 1 App. Cas. 110. 13. (1889) 60 L T 288

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The Court expressed the following

OPINION :—*The Officiating Cheif Justice* :—The question that has been referred for our opinion is:

"In a temple scheme settled by the Court where liberty to apply is reserved to a person or persons (*a*) to ask for directions as to carrying out the scheme or (*b*) to move the Court for alterations or modifications of the scheme—is this reservation *intra vires* of the Court or is a separate suit necessary either under the provisions of S. 92, Civil Procedure Code, or on the ground that the suit has come to an end and the Court therefore *functus officio*?"

This question has been decided by a Bench of this Court in *Abdul Hakim Baig* v. *Burramiddin* (1) where it was held that the provision in a scheme for an application being made for relief specified in S. 92, Civil Procedure Code, was *ultra vires*. The same view was also taken by another Bench of this Court in *Brahmayya* v. *Venkatasuryanarayanamurthy* (14) and in *Narayanamurthi* v. *Achayya Sastrulu* (15), Spencer and Srinivasa Aiyangar, JJ., came to the same conclusion although in that case the observation was purely *obiter*. In *Ankayya* v. *Venkata Ramayya* (16), Madhavan Nair, J., and myself were inclined to take the same view, but it was unnecessary for the purposes of that case to decide the question. *Prima facie* a direction by the Court that future proceedings with reference to a trust should be held before it by means of an application would appear to be *ultra vires* in view of S. 92, Civil Procedure Code. That section prescribes that in the case of breach of a trust created for public purposes of a charitable or religious nature a suit has to be filed either by the Advocate-General or by persons who have obtained his sanction. The section specifically indicates that the remedy is by way of a suit subject to certain conditions and consequently any provision which says that the same remedy may be obtained by means of an application without conditions to the Court would appear to be *ultra vires*. It is pointed out in *Prayag Doss Ji Varu, Mahant* v. *Tirumala Srirangacharlavaru* (3) by Subrahmania Aiyar, J., that the Courts in this country have been given under S. 539 of the Civil Procedure Code (corresponding to the present S. 92) the same powers as were possessed by the Court of Chancery at the time of its enactment, and this view was upheld in *Ramados* v. *Hanumantha Rao* (17). It does not

3. (1905) I L R 28 M 319 : 15 M L J 133.
1. (1925) I L R 49 M 580. 14. (1925) 50 M L J 409
15. (1924) 47 M L J 714. 16. (1926) M W N 283.
17. (1913) I L R 36 M 364 : 21 M L J 952.

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necessarily follow from this that the procedure to be adopted when exercising this power must be the procedure prescribed for the Court of Chancery in England. On the contrary, in cases relating to public trusts S. 92 of the Civil Procedure Code definitely lays down the procedure to be adopted before the jurisdiction of the Court can be invoked. Similarly in England under Sir Samuel Romilly's Act and the Charitable Trusts Act a certain procedure is laid down and that procedure is different from the procedure in this country, for the Attorney-General is allowed to proceed in the matter of these trusts by means of a petition—a procedure which has been substituted for the previous method of proceeding by information. As against this view it was contended by Mr. Rangachariar that the Courts have power to insert such provisions in a scheme and he bases his argument on two grounds: (1) In Administration suits and other similar suits the Court has always power to give leave to apply and even in some cases where such leave is not expressly reserved it may be implied; and (2) The Privy Council has on two occasions sanctioned the insertion of a similar provision in schemes approved by it. The principle upon which the Court reserves leave to apply is based on the fact that in certain suits the Court is unable to give a complete judgment upon all the points connected with the case, or even if it is not unable to do so, it thinks it advisable that the decision should be deferred. In all such cases, naturally leave to apply at a later date is either expressly given or possibly may be implied, but when the Court has finally decided any question there can be no ground for granting leave to put in an application to modify this final conclusion, for the final conclusion has become a decree and an application to modify it would be an application to set aside the decree. When therefore the Court has definitely framed a scheme for a religious institution under S. 92, Civil Procedure Code, and has decided that certain things shall be done under the scheme, it can hardly be said that this is not a final adjudication of all the questions arising in the suit in connection with such scheme and consequently one cannot infer that anybody could as of right apply for modification of the scheme. Reference may be made to *Re Jarvis's Charity* (18), where it was held that when a petition was presented for the appointment of a new trustee the certificate of the Charity Commissioners under the Charitable Trusts Act was essential. That

18. (1859) 1 Dr. & Sm. 97 : 62 E R 315.

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certificate is similar to the sanction of the Advocate-General referred to in S. 92. The ground of that decision was that a final order had already been made and therefore the petition on which it was made cannot be said to be actually pending. It was held in *Attorney-General* v. *The Bishop of Worcester* (11) that a scheme having been framed might be subsequently altered but it was recognised that such alteration must be effected on an application by the Attorney-General—the procedure prescribed for such matters in England. The mere fact that the Court will allow a modification of the scheme does not necessarily show that modifications can be carried out in this country by procedure other than that prescribed by S. 92.

So far as the authority of the Privy Council is concerned, I am inclined to think that too much weight may easily be attached to the two cases relied on by Mr. Rangachariar. The first is the *Tirupathi Temple case, Prayag Doss Ji Varu, Mahant* v. *Tirumala Srirangacharlavaru* (3). The judgment of this Court in that case does not give us much assistance in the present case, but in the appeal from this Court, the judgment in which is reported in *Prayag Doss Ji Varu* v. *Tirumala Srirangacharlavaru* (4), the Privy Council with a few modifications approved the scheme framed by the Madras High Court and that scheme contained the following two provisions:—

"Clause 10. Liberty for the Vicharnakartha and any person interested to apply to the District Court with reference to the carrying out of the directions of the scheme.

Clause 11. Liberty for the Vicharanakartha and any person interested from time to time to apply to the High Court for any modification of the scheme that may appear to be necessary or convenient."

The words "or convenient" were added by the Privy Council. Clause 11 certainly supports Mr. Rangachariar's view that the Privy Council approved of a direction to apply to the Court by a petition for modification of the scheme. However, when we peruse the report more carefully it appears that this appeal was heard *ex parte* and the scheme appears to have been finally settled "with the assistance of the learned Counsel engaged." The question of the validity of clauses 10 and 11 was not raised before their Lordships and cannot be said to have been decided. The other case relied on is the *Dakore Temple*

3. (1905) I L R 28 M 319 : 15 M L J 133.
4. (1907) I L R 30 M 138 : 17 M L J 236 (P C).
11. (1851) 9 Hare 328 : 68 E R 530.

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case (6). This went before the Privy Council and is reported in *Kirpashankar* v. *Manohar Tambekar* (19). In that case the scheme prepared in the lower court was approved with a few modifications. Reliance is placed mainly on cl. 20 of the scheme which says that the provisions of the scheme may be altered, modified, or added to by an application to His Majesty's High Court of Judicature at Bombay; but we find there is also a cl. (12) which directs the Committee to make rules for various purposes, which rules have to be sanctioned by the District Court of Ahmedabad, so that they may have the same force as if they were part of the scheme, sub-clause 7. Therefore, after the case left the Privy Council further rules had to be framed and sanctioned by the District Court, and apparently under clause 20 alterations or modifications might be made by the High Court of Bombay. That this is the intention of their Lordships appears from the report in *Bhogilal* v. *The Dakore Temple Committee* (5). Apparently rules had been framed under the scheme and were sanctioned by the District Court. Against the order of the District Court an appeal was filed in the High Court and from there the case was taken to the Privy Council. It was then held that it was wrong to consider the order made by the District Judge sanctioning the rules as one under S. 47, Civil Procedure Code, and therefore no appeal lay to the High Court and similarly no appeal lay to His Majesty in Council; but it was suggested that the High Court had power conferred upon it by clause 20 of the scheme to alter, or modify, or add to the rules sanctioned by the District Judge on an application made to it with that object, but it had no other power. The scheme, therefore, as it left the Privy Council, was not final and further orders were necessary in the District Court and in the High Court before the scheme took its final shape. In the circumstances of these two cases which I have analysed can it be said that the Privy Council has decided that a provision for persons interested to apply for modification of the scheme is not *ultra vires*? To do so would, I think, be stretching case-law too far. The point was never raised, much less decided, but in certain circumstances and without contest the Privy Council has given its sanction to such a rule in the *Tirupathi Temple case* (4). The rule in the *Dakore Temple case, Kirpashankar* v. *Manohar Tambekar* (19) appears to be one framed before the

4. (1907) I L R 30 M 138 . 17 M L J 236 (P C).
5. (1925) 49 M L J 25 (P C). 6. (1925) 28 Bom. L R 309.
19. (1912) 24 M L J 199 (P C).

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final shaping of the scheme. I am, therefore, of opinion that in neither of these cases can it be said that the Privy Council is of the opinion that such a clause is *intra vires*. We have, therefore, the opinion of several Judges of this Court that such a rule is *ultra vires* and, on the other side, there is the very vague authority of the decisions of the Privy Council.

In Patna and Calcutta a different view has been taken. In *Sadupadhya Omeshanand Oja* v. *Raveneswar Prasad Singh*(20) it was held by the Calcutta High Court that power might be given to amend the scheme on an application—a power which should even include the removal of a member of the temple committee. In *Muhammad Waheb Hussain* v. *Abbas Hussain* (21), the Patna High Court held that not only was such a rule *intra vires* but that it was necessary that it should be inserted. Both these cases seem to treat the suits as administration actions, but although they may deal with questions relating to the administration of the trust fund, certainly not every suit under Section 92 can be called an administration suit. A suit may be for the removal of a trustee and the decree may be passed accordingly, but this certainly cannot be said to be an administration suit. The question of administration very frequently arises and it is for the Court to decide in what manner the administration shall be carried out, but it does not follow from that that the Court should assume to itself the administration of the trust, which, in fact, it does, if it makes rules providing for applications to be made by trustees and others interested in the trust for varying or modifying the scheme already framed. If there is leave to apply in such suits, it necessarily implies that the suit is pending, and therefore if once a suit has been filed for settling a scheme and liberty to apply is given in the scheme, the suit should be deemed pending for ever and ever, for it is always possible that some person interested may make an application. This principle therefore of reserving liberty to apply in temple suits appears to me to be based on wrong premises. It should only be done when the Court is unable, or for good reasons thinks it advisable not to finally determine any question arising for its decision but to leave such decisions for a future date. Unless there is some ground of this sort, the decision must necessarily be final and therefore an order that such final decision can be altered by a mere application would seem to be *ultra vires*. I

20. (1917) 43 I C 772. 21. (1922) 4 P L T 326.

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may observe here that the question put to us is a double question and the answer to the two parts of the question must be different. The first is "Where liberty to apply is reserved . . . to ask for directions as to carrying out the scheme . . ." So far as this is concerned this may well be *intra vires* unless it contravenes the provisions of S. 92, Civil Procedure Code, for the assistance of the Court is asked merely to carry out what it has already odrered, and if such assistance can be given without contravening the provisions of S. 92, there can be no objection to such a rule being framed, but when premission is given to apply to the Court for alteration or modification of the scheme it appears to me that this at once offends against S. 92. The scheme having been framed, any modification or alteration of it is in effect a new scheme and the power to frame a scheme is given only subject to the conditions specified in S. 92. I will therefore answer the question put to us by one joint answer, namely, that the reservation by the Court to a person or persons to apply for a relief which will come within S. 92 of the Civil Procedure Code is *ultra vires* but that if such reservation does not offend in this way or against any other provision of law it may be useful or advisable for carrying out the provisions of the scheme already framed.

Beasley, J.

Beasley, J.—I agree.

Anantakrishna Aiyar, J.

Anantakrishna Aiyar, J.—I also agree.

A. S. V. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WILLIAM PHILLIPS, *Kt., Officiating Chief Justice,* and MR. JUSTICE REILLY.

Gadamsetty Nammalwar Chetti and another ... *Appellants** (*Defendants*)

v.

Gadamsetty Perundevi Thayarammal... *Respondent* (*Plaintiff*)

Nammalwar Chetti v. Perundevi Thayarammal

Hindu law—Husband—Power over wife's stridhana *during his illness or famine, etc —If restricted to using only—Power to keep it for himself without using it for the relief of his distress—If exists—Power if personal or available to his creditor*

The plaintiff's husband was ordered to pay a sum of Rs. 12,300 into Court by a certain time in a previous suit in which the defendants in the present suit were the plaintiffs. After the date fixed for payment the plaintiff's husband arranged to sell the plaintiff's jewels to the defendants

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*O. S. Appeal No. 107 of 1926. 1st September, 1927.

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in part satisfaction of the claim of Rs. 12,300 under the order and put in an application to the Court to sanction this arrangement as the 2nd defendant who was the 2nd plaintiff in that suit was then a minor. Pending the obtaining of the sanction of the Court, the jewels were deposited by him with a mediator. Before the Court gave the sanction, the present plaintiff claimed the jewels as hers and they were also attached by a creditor. Accordingly orders were postponed and finally the application was withdrawn and dismissed. The plaintiff's husband also died. The plaintiff instituted the present suit to recover the jewels impleading the plaintiffs in the previous suit as well as the mediator who had the jewels as defendants.

Held, that the plaintiff's husband cannot be said to have 'used' or "disposed of" these jewels before he died, as the mere fact that he took them and deposited them with the mediator pending sanction of the Court, which was ultimately not obtained, did not pass the property in the jewels to the defendants.

Under the Hindu law, the power of a husband in illness or during famine or while under restraint or in the performance of a duty is only to *use*, or *dispose of*, his wife's property for the relief of his distress, but, if he does not use it for such a purpose, he cannot keep it for himself. This power of the husband is personal to himself and cannot be availed of by his creditor.

On appeal from the decree and judgment of the Hon'ble Mr. Justice Srinivasa Aiyangar, dated 22nd September, 1926, and made in C. S. No. 329 of 1924 in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

K. G. Ramaswami Aiyar for appellants.

S. Guruswami Chetty for respondent.

The Court delivered the following

Sir William Phillips, O.C.J.

JUDGMENT :—*Officiating Chief Justice*:—In this case the plaintiff-respondent sues to recover certain jewels which, she alleges, are her *stridhanam*. Her husband was ordered to pay a sum of Rs. 12,300 into Court by the 7th April, 1924. The order was passed on the 24th March. The payment was to be made in a suit in which the present appellants were the plaintiffs. After the date fixed for payment it appears that the plaintiff's husband arranged to sell the jewels now claimed by the plaintiff to the appellants in part satisfaction of the claim of Rs. 12,300 under the order. In accordance with the arrangement the plaintiff's husband put in an application to the Court to sanction this arrangement as there was a minor concerned and the arrangement amounted to a compromise between the parties in respect of this claim of Rs. 12,300. The appellants signified their agreement to this application when it was put into Court. The application was for leave to be granted to the 1st plaintiff to

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receive these jewels on behalf of his minor son in respect of this order of Rs. 12,300. An affidavit was filed at the same time which said that

"It had been agreed that in lieu of the said sum of Rs. 12,300 the undermentioned jewels should be handed over by the 1st defendant to the 1st plaintiff . . . . All the eight items have now been deposited with the mediator pending the order of this Hon'ble Court granting leave to the 1st plaintiff to receive them".

Before the leave of the Court was obtained the present plaintiff claimed these jewels as hers and they were also attached by a creditor. Accordingly orders were postponed and finally the application was withdrawn and dismissed on 24th July, 1924, with the plaintiffs', the present appellants', costs, by which date, the 2nd appellant had obtained majority. The appellants have relied at the trial on a provision of Hindu Law, that in times of necessity a husband is entitled to take his wife's property to releive that necessity. It has been found by the learned Judge that that necessity did not exist but he has also found in his judgment–he does not base his decision on it–that the husband had not disposed of these jewels and as he died before the disposal the creditors cannot seize the jewels which belonged to the plaintiff to pay his debts. This finding was not in accordance with the pleadings and apparently the attention of the parties had not been directed to it, but it having found a place in the judgment it was undoubtedly the duty of the appellants to meet this aspect of the case. They were not prepared to do so at the first hearing but were granted time and have now argued the case. In the first place they contend that the finding that the jewels were the *stridhana* of plaintiff is wrong. There is the evidence of the plaintiff and her relations coupled with entries in her husband's account book which go strongly to support the plaintiff's case. There is no evidense *contra* and I must therefore accept the learned Judge's finding that the jewels were plaintiff's.

The next question is whether the husband had disposed of these jewels before he died. He had deposited them with a mediator who was to hold them pending sanction of the Court being obtained. His possession therefore was clearly the possession of the person who would be entitled to these jewels subject to the Court's order. If the sanction had been given, his possession would have been that of the appellants. But in this case no sanction was given and therefore the property in the jewels did not pass to the appellants. There was an agree-

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ment by the deceased to sell the jewels but payment had not been made and the goods had not been delivered and therefore the property in them had not passed. It was then contended for appellants that this is not necessary but that according to the text the husband had a right to take his wife's *stridhana* and need not dispose of them. The text runs as follows:—

"A husband is not liable to make good the property of his wife taken by him in a famine or for the performance of a duty or during illness or while under restraint".

It is contended that the word "taken" means only physical taking and not necessarily the use or disposal of the property. The same text is explained in several passages in the Smriti Canndrika which clearly show that the word 'take' has the meaning of use or disposal and it is difficult to hold that it merely means physical taking. If that were the meaning, the husband in illness or in a famine could take his wife's *stridhana* and not use it for his benefit but he might recover or obtain relief by other means and would apparently be entitled to retain possession of his wife's property which was still in his hands. This is a very strange interpretation to put upon the text which clearly refers to the husband being entitled in case of necessity to make use of his wife's property as well as his own in order to obtain relief. In that view the only way in which he could be said to take the property would be when he takes it and disposes of it for his own benefit. This contention therefore cannot be accepted.

The further contention that by placing the jewels in the hands of a mediator the husband did obtain relief and that the jewels themselves were the cause of his relief and that therefore he is not liable to make them good is clearly a fallacy. It is not the jewels themselves that gave the relief but the agreement by the deceased to sell them to the appellants. As a consequence of that agreement which was never completed, we may assume that they did refrain from taking active steps against him; but the deceased unfortunuately died before the jewels had passed to the appellants and it has been consistently held that his right to take his wife's jewels does not extend to a creditor or any other person whatever.. As he had not exercised that right during his lifetime, the jewels remained the property of the plaintiff.

The appeal is accordingly dismissed with costs. As regards the costs which have been ordered to be paid to the 3rd defendant's legal representative's guardian, it can only be obser-

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Reilly, J.

ved that the mediator was a necessary party to the suit and, as he is not himself liable for costs, he must be paid by the losing party.

Reilly J. :—I agree that we certainly cannot interfere in this case with the finding of the learned trial Judge that the jewels in question were the *stridhana* property of the plaintiff, on which point the evidence at the trial was all one way.

In the argument in this appeal, so far as it has been necessary to go, it has been assumed that the exceptional circumstances which will justify a husband in taking his wife's *stridhanam* and dealing with it to relieve his own distress have been fulfilled. But it has been disputed whether his right is only to use that property for the relief of his distress or he is entitled to take it from his wife for the purpose of relieving his distress but, if he does not use it for that purpose, to keep it nevertheless for himself. The text upon which the special power of the husband to take his wife's *stridhana* is founded is that of Yagnavalkya:—

"A husband is not liable to make good the property of his wife taken by him in a famine or for the performance of a duty or during the illness or while under restraint"

Speaking for myself I should have thought it obvious that 'taken' in that verse means 'taken and used'. But no very great discussion on that point is really necessary because the Smriti Chandrika, undoubtedly an authority in this Presidency, explains the verse as meaning that the husband is entitled to use his wife's property in those circumstances; and the quotation which has been read to us from the Mitakshara, in which the verse is slightly enlarged, certainly is not against that interpretation of it.

Then the question in this case is —did the husband actually use these jewels to relieve his necessity? What it appears he did was to enter into a contract of sale in regard to them. The jewels were to be sold to defendants 1 and 2 for Rs.9,500, part of a sum which the plaintiff's husband had been directed to pay into Court for the benefit of 2nd defendant. But the agreement of sale had a term in it that the plaintiff was to obtain the sanction of the Court for this adjustment. If the agreement between the parties had been that the plaintiff's husband was to have something done to the jewels, to have them cleared or mended or reset or anything of that sort, it is perfectly clear and indeed unquestionable that the property in the jewels would not have passed from him to the 2nd defendant until that work had been done. And I think the same principle

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applies where the seller undertakes to do something in respect of the goods. In this case the plaintiff's husband undertook to get the sanction of the Court and, so far as we can see, honestly undertook that. He applied for the sanction of the Court; but, before the sanction was obtained, he died. Then had the property passed at the date of his death? I think the answer to that clearly must be 'no'. If the property had not passed, then he had not made use of the jewels to relieve his necessity, and, as the right to use them was peculiar to himself, it ended with his death. If the jewels had been in his house or in his possession at the date of his death, I think there can be no doubt that the plaintiff could have recovered them. In this particular case it happens that the jewels, pending the sanction of the Court, were handed over to a third party, a "mediator". But that does not really affect the legal position at all, the mediator being like a stake-holder trustee for whichever party might eventually be entitled to the jewels.

What appeared to me to be the most effective argument for the 2nd defendant was raised by Mr. Narasinga Rao in his reply, namely that the plaintiff's husband got a benefit out of his dealings with the jewels He was by the order of the Court to pay the Rs. 12,300 by the 7th April; but by the arrangement which the 2nd defendant entered into and the petition for sanction the proceedings were prolonged until after the plaintiff's husband died on the 20th April. It is urged, therefore, that from the 7th April to the 20th April the plaintiff's husband obtained a benefit out of his dealings with the jewels. But, as my Lord has explained, that benefit was obtained, not by the use of the jewels or any transfer of property in them, but by the agreement to sell them in certain circumstances which were never fulfilled.

I agree that this Appeal must be dismissed with costs.

N. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE DEVADOSS.

Kulandaivelu Pillai ... *Appellant** (*Plaintiff*)

v.

Venkatarayar and another ... *Respondents* (*Defendants*).

Kulandaivelu Pillai v. Venkatarayar.

Benami deed—Deed at its inception a—Use of, afterwards as an operative deed—Permissibility.

When a document is executed without the intention of conveying title by one person in favour of another, it cannot afterwards be used for the purpose of conveying title merely because one of them changes his mind and wants the document to be operative. When a document is once executed as a nominal document, that is to say, without intending to convey any title, it cannot afterwards be used for the purpose of conveying title.

Second Appeal against the decree of the Court of the 1st Additional Subordinate Judge of Madura in A. S. No. 8 of 1922 (A. S. No. 247 of 1921, District Court of Madura), preferred against the decree of the Court of the District Munsif of Thirumangalam in O. S. No. 517 of 1920 (O. S. No.987 of 1919, Periyakulam District Munsif's Court).

F. S. Vas for appellant.

A. S. Srinivasa Aiyar for respondent.

The Court delivered the following

Odgers, J.

JUDGMENT :—*Odgers, J.* :—This was a suit brought by one Kulandaivelu Pillai, the adopted son of Muthukumara Pillai, for the recovery of possession of the suit lands which, as he alleged, had been trespassed upon by the 2nd defendant in October, 1914. The appeal really hinges on the effect, if any, to be given to Ex. I. Ex. I. purports to be a sale deed, dated 8th June, 1899, executed by Muthukumara Pillai, in favour of his son-in-law Ramaswami Pillai, the 1st defendant, and, as alleged by the plaintiff, was a *benami* sale-deed with no consideration. It was executed for a certain purpose set out in paragraph 5 of the plaint. The defence of the 1st defendant was that the sale-deed, Ex. I, was a perfectly valid deed and a proper price had been paid for the lands in question. The finding of the District Munsif is that no consideration was paid by the 1st defendant for Ex. I and that when it was executed it was intended only to be a nominal transaction. That being so, the

* S. A. No. 1665 of 1923. 18th April 1927.

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learned District Munsif went on to find that, in spite of these findings, Ex. I could be used long afterwards, namely, in 1910, by way of gift or rather to give effect to a document which was originally a nominal transaction but which had ceased to be such and which had been given effect to either before or about the time of the adoption of the plaintiff. There is some evidence that the father-in-law Muthukumara Pillai did intend to benefit his son-in-law and his daughter in some way, for instance, he effected a change of patta with the Revenue authorities and gave them possession of the lands. Ex. I was executed, as found, with the intention of being a purely nominal transaction, that is to say, of having no legal effect. Can it then be said that the executant of this nominal transaction, by a change of intention, can afterwards use it for a transaction which would be valid in law? In my opinion there are several very obvious objections to the re-employment, if one may so call it, of a document of this description. There are evasions of the Stamp law, the Registration Law and the fiction that you are to regard the recitals in Ex. I as non-existent and as conferring what is practically a gift on the person to whom Ex. I is handed over. We have been shown no authority by which the executant of a document executed with one intention can by change of mind utilise that document for a transaction of a wholly different character. There is another very short objection to this second appeal and that is this, that this case was never set up in the pleadings or the issues but has apparently been found by both the lower courts from motives of sympathy with the daughter and son-in-law of Muthukumara Pillai. It seems to me that such is out of place in a second appeal and we must strictly confine ourselves to the question of law that has been raised and for which, as I say, no authority has been cited. A case has been quoted by Mr. Vaz, the learned counsel for the appellant, from *Bai Motivahoo* v. *Purshotam Dayal* (1) an expression of opinion of Sir Lawrence Jenkins, which is perhaps as near as one will get to anything in the reports. The cases on gift or long possession amounting to evidence of gift quoted by the learned vakil for the respondents do not seem to me to have any bearing on the present case where the evidence given on the pefectly straitforward and simple case set up in the pleadings and the issues has been directed by both the lower courts to this finding of a re-utilisation of

1. (1904) I L R 29 B 306 at p. 315.

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Ex. I, for giving it the effect of a gift deed. For these reasons, I think the second appeal must be allowed with costs throughout.

Devadoss, J.

Devadoss, J.—I agree. I only wish to add that when a document is executed without the intention of conveying title by one person in favour of another, it cannot afterwards be used for the purpose of conveying title merely because one of them changes his mind and wants the document to be operative. When a document is once executed as a nominal document, that is to say, without intending to convey any title, it cannot afterwards be used for the purpose of conveying title

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON AND MR. JUSTICE THIRUVENKATACHARIAR.

Ellammal and others ... *Petitioners** (*Accused*)

Ellammal, *In re.*

Madras Local Boards Act (XIV of 1920), S 171 (3)—Order under—Validity—Conditions

On an application for a license by the owners of a private market before the commencement of the Madras Local Boards Act of 1920, the Taluk Board passed a resolution refusing the license alleging merely that they considered it undesirable that the market should be kept open there, and communicated it to the petitioners.

Held, that the order of the Board was not a legal order passed in the exercise of their powers under the Act.

Per Jackson, J :—Refusal to function under the Act is not passing an order under the Act. The order must be *intra vires* and an order *ultra vires* is no order at all.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Deputy 1st Class Magistrate of Saidapet in Criminal Appeal No. 65 of 1926, preferred against the judgment of the Court of the Stationary Sub-Magistrate of Poonamallee in Calendar Case No. 450 of 1926

M. S. Venkatarama Aiyar for petitioners.

The Public Prosecutor for the Crown.

The Court made the following

Jackson J

ORDER :—*Jackson, J.* :—The three petitioners have each been fined Rs. 5 by the Sub-divisional Magistrate, Saidapet (confirming on appeal the judgment of the Sub-Magistrate,

*Crl. R. C. No. 30 of 1927. 9th August, 1927.
(Crl. R. P. No. 25 of 1927)

Ellammal *In re.* — Jackson J.

Poonamalee), under Ss. 175 and 207 of the Madras Local Boards Act, XIV of 1920, for selling fish in an unlicensed private market.

2. Admittedly the petitioners were owners of a private market before the commencement of the Act. That being so they were entitled to the grant of a license subject only to such conditions as regards sanitation etc., as the Union (S. 188) might impose. That is the clear meaning of S. 171 (3) :

"The Board shall grant the license applied for subject only to such regulations" *etc.*

and it is difficult to see how anything else could have been enacted. A private market is a private property and an Act to consolidate the law relating to local boards could hardly be an Act of confiscation. At the same time it is clearly within the Board's competence to see that such property is enjoyed without detriment to public health.

3. Under S. 212 (11) it is provided that, if orders on applications for license are not communicated to the applicant within 30 days after the receipt of the application by the President, the applications shall be deemed to have been allowed for the year. The petitioners seem to have applied for the year 1926-27 and on the 8th May, 1926, the Board passed a resolution that a license cannot be granted and communicated this information to the petitioners.

4. It is contended by the learned Public Prosecutor that this is an order on the application such as is contemplated by S. 212 (11). The petitioners argue, on the contrary, that an order on an application must be a legal order within the terms of the Act and an announcement that the Board declines to perform its statutory duty is no such order. This seems to be a valid plea. The Board is bound to grant a license, and if, when it receives the application in due course, it confines itself to saying that it will not grant the license, it is tantamount to passing no order on the application. Refusal to function under the Act is not passing an order under the Act. The order must be *intra vires* and an order *ultra vires* is no order at all.

5. In these circumstances the conviction cannot be upheld. It is set aside and the fines are ordered to be refunded

Thiruvenkatachariar J.

Thiruvenkatachariar, J. :—I agree with my learned brother that the conviction in this case should be set aside; and as the question is one of some importance I shall add a few words. The Madras Local Boards Act of 1920 permits only the keep-

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Thiruvenkatachariar, J.

ing open of a private market which was in existence before the commencement of that Act, and no new private market can be opened after the commencement of that Act. The owner, occupier or farmer of any private market has to take out annual license without which he cannot keep open the market. The license has to be applied for not less than six weeks before the commencement of the year for which it is required. If no order on the application for license is communicated to the applicant within thirty days after the receipt of the application by the President of the Board concerned, the application, shall be deemed to have been allowed for the year or for such less period as is mentioned in the application and subject to the rules, bye-laws, regulations and conditions ordinarily imposed [See S. 171, 123 and 212 (sub-section 11)]. In the case before us the applicants have been convicted for selling fish in a private market which was unlicensed on the date of the sale, viz., May 15th, 1926. It is not clear upon the evidence when the application for license for the private market for the official year 1926-27 was put in. So far as I can see, it was put in on the 23rd April, 1926, which would be after the commencement of the official year. Upon that petition the Union Board passed the proceedings of the 8th May, 1926, refusing the license applied for and a copy of the resolution was communicated to the petitioners and the same presumably reached them within 30 days from the date of their application. The learned vakil for the applicants therefore has raised no ground that the appellants are entitled to the benefit of the last part of S. 212 (sub-section 11). His contention on behalf of the appellants is that the order refusing the licence is illegal and *ultra vires,* and that unless and until a legal order is passed the application for license cannot be considered to have been properly disposed of and hence the applicants cannot be convicted under S. 175.

S. 171 (3) which is relied on says :

"The Taluk Board shall grant the license applied for subject only to such regulations as to supervision and inspection and to such conditions as to sanitation and drainage *etc*, as the Taluk Board may think proper"

It is argued that under this provision the Taluk Board, though it may impose conditions in the interests of public health, has no power to refuse the license and that therefore the refusal of the license cannot be held to be a valid exercise of the powers conferred on the Union Board. The learned Public Prosecutor on the other hand contends that under sub-section 3 of S. 171 it is open to the Union Board to refuse a

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license when, in its opinion, the conditions of the market are such that the license should not be granted. The language of S. 171 (3) is by no means happy, but on the whole I think that the contention of the applicants is the correct one. That conclusion is supported by the provisions of Ss. 176 and 177 of the Act. Under S. 177, the Board may refuse to grant to the applicant the license applied for only when it has served a notice on the owner, occupier or farmer of the private market to do any of the things mentioned in the clauses (*a*) to (*f*) of S. 176 and he fails within the period and in the manner laid down in the said notice to carry out any of the works mentioned in S. 176. In the present case no such action was taken by the Board under S. 176 and the refusal to grant a license cannot therefore be justified under S. 177. The reason given in the resolution of the 8th May, 1926, is that the license cannot be issued, because, in the opinion of the District Board, the location of the private market at that place is detrimental to the health of the city itself. It is no doubt within the province of the Board to close any private market if, in their opinion, it ought not to be continued in the interests of public health; but in such cases they have to do one of two things. They may give a notice to the owner under S. 176 to carry out such works as may be considered necessary for rendering a private market a suitable one, or they should acquire the owner's rights in the private market under the Land Acquisition Act in S. 180. Otherwise, it would be, as observed by my learned brother, confiscating private rights without compensation, which intention cannot be imputed to the legislature. The Board's resolution of the 8th May, 1926, has ignored all these provisions and the Board has refused the license alleging merely that they consider it undesirable that the market should be kept open there. I agree therefore that the order of the Board cannot be supported as a legal one passed in the exercise of their powers and that the conviction should be set aside.

A. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Peria Muthusami Naicken ... *Appellant** (*Plaintiff*)

v.

Somasundaram Mudaliar and another ... *Respondents* (*Defendants*).

Muthusami Naicken v. Somasundaram Mudaliar.

Negotiable Instruments Act—S 28—Guardian de facto—*Promissory note by—Capacity of execution of, personal or as guardian—Test—Note by guardian for minor's debt executed in personal capacity—Claim against minor's estate by taking of—Abandonment of.*

2nd defendant, the then junior paternal uncle *and de facto* guardian of the minor 1st defendant, executed a promissory note for the discharge of a mortgage debt over the minor's estate. In the body of the note, 2nd defendant described himself as guardian and junior paternal uncle of the 1st defendant, but he signed it merely as "Ramanatha Mudaliar, Kurnam".

Held, that the 2nd defendant executed the note in his own personal capacity and not as *de facto* guardian of the 1st defendant.

Held further, on the frame of the note, that the payee thereunder was content to have the debt satified by the 2nd defendant's promise and that he abandoned his claim against the 1st defendant's estate.

Second Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in A. S. No. 23 of 1924 (A. S. No. 254 of 1923 on the file of the District Court, Coimbatore), preferred against the decree of the Court of the District Munsif of Udumalpet in O. S. No. 607 of 1922.

K. Periasami Goundar for appellant.

T. M. Krishnaswami Aiyar and *T. M. Vedantam* for respondents.

The Court delivered the following

JUDGMENT :—The second defendant executed a promissory note to the plaintiff on 27th July, 1919. He was then the junior paternal uncle and *de facto* guardian of the minor 1st defendant. The promissory note was for the discharge of a mortgage debt over the minor's estate. In the body of the promissory note, 2nd defendant described himself as guardian and junior paternal uncle of the minor Somasundaram Mudaliar (1st defendant) and he signed it as 'Ramanatha Mudaliar, Kurnam'. The point for decision in this case is whether he signed the note in his own personal capacity or in his capacity as *de facto* guardian of 1st defendant.

*S. A. No. 1218 of 1924. 30th March, 1927.

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Now, in a matter of Negotiable Instruments which may pass from hand to hand to persons who have no personal knowledge of original parties at all, the law that it must be clear on the face of the note who has executed it and whose estate is liable for it must be interpreted more strictly than in the case of a contract, and citations of cases which deal with contracts seem to me of little value in this connection. I am clear that the proper principle is that elasticity in the interpreattion of the law in the matter of a promissory note is not permissible, and that if parties do not make it clear on the face of the note that the executant signing it is binding not himself but some one else, they must themselves take the consequences.

In the present case I am unable to hold that the mere description of the executant as guardian and junior paternal uncle is sufficient to indicate that the executant did not intend to bind his own estate. On the contrary the note goes on to say "I (that is, he who signs, Ramanatha Mudaliar) have received cash Rs. 750. I shall on demand...." and the description of himself in the signature is not "guardian" but "kurnam". I think it is clear that he executed the note in his own personal capacity and that it does not bind and was not intended to bind the minor's estate.

The respondent calls in aid a decision in *Krishna Aiyar* v. *Krishnaswami Aiyar* (1) but that clearly has no application to the present case, since the present case is not one where the 1st defendant by his personal law is liable in respect of the debt incurred by the 2nd defendant. The decision in *Krishna Chettiar* v. *Nagamani Ammal* (2) is in point. It proceeded on the footing that the language of S. 28 of the Negotiable Instruments Act cannot by analogy be applied to a case of guardian. But the correctness of this decision was questioned in *Ammalu Ammal* v. *Namagiri Ammal* (3) as noted by the late Chief Justice in *Palaniappa Chettiar* v. *Shanmugam Chettiar* (4). A case of this High Court reported in *Ramaswami Mudaliar* v. *Muthuswami Aiyar* (5) is an exact parallel as is the case in *Subbarayudu* v. *Subbanna* (6). So also the case reported in *Subbanna* v. *Subbarayudu* (7), where the law on the subject is treated at length. I respectfully agree with the observations in that case. On the face of this note

1. (1900) I L R 23 M 597 at p 606. 2. (1915) I L R 39 M 915.
3. (1917) 33 M L J 631. 4. (1918) I L R 41 M 815 : 35 M L J 90
5. (1915) 30 I C 481. 6. (1924) 47 M L J 765.
7. (1925) 50 M L J 125.

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it is clear to me that 2nd defendant has not unequivocally indicated that he is not personally liable. The necessity for such a clear, unequivocal indication is laid down by a Bench of three Judges in *Koneti Naicker* v. *Gopala Aiyar* (8).

It has been urged by the respondent that this contention of the appellant is a new point not urged until now and that, if the Court allows it, he ought to be given an opportunity to amend his plaint so as to hold the 1st defendant liable on the original debt since in the original plaint he has sued only on the promissory note. But I think the point was clearly raised in the only issue, framed:

"From which of the defendants is the plaintiff entitled to recover the suit amount" ?

The frame of the note itself threw on the plaintiff the burden of showing that the 2nd defendant had unequivocally excluded his personal liability, if he wanted to prove, as from his plaint it is perfectly clear that he did want to prove, that the person liable was the 1st defendant. I can see no reason for allowing the amendment at this late stage. On the frame of the note I am clear that the plaintiff was content to have this debt satisfied by the 2nd defendant's personal promise and he cannot now be allowed to put forward a claim against the 1st defendant's estate which he abandoned when he took the note, and which will, if now put forward by a separate suit, be barred by time.

I refuse to interfere and dismiss this appeal with costs of 1st defendant.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE CORNISH.

C. K. Subramania Mudaliar ... *Appellant** (*Plaintiff*)

v.

The Chairman, Municipal Council,
Coimbatore and another ... *Respondents** (*Defendants*)

Subramania Mudaliar v. The Chairman Municipal Council, Coimbatore.

Madras District Municipalities Act, S 9, Cl 1—Applicability of Wards— "If from any cause no councillor is elected at an ordinary election"—Meaning

In anticipation of a vacancy to occur in a Municipal Council the chairman fixed certain dates for receiving nominations, for the scrutiny of the

*S. A. No. 1910 of 1926 18th July, 1927.

8. (1913) I L R 38 M 482 : 25 M L J 425.

Subramania Mudaliar v. The Chairman, Municipal Council, Coimbatore.

nominations, and for the taking of the poll. Owing to a mistake committed by the chairman, he dropped these proceedings, and started fresh proceedings for election. He fixed the 23rd September for receiving nominations and the 4th of October for polling. On the 1st of October, the plaintiff, the then sitting member, declared his willingness to serve, but the chairman, refusing to accept this as one which the member was entitled to make at that stage, started fresh election proceedings calling for nominations.

Held, that S. 9, Cl. (1) of the District Municipalities Act, was inapplicable to such a case and that the plaintiff did not continue as a valid member under the Act.

S. 9, Cl. 1 of the Act applies only to cases where a valid election has been held under the previous section. It does not apply to all cases where elections have been contemplated but on account of various irregularities no Councillor was elected.

Seconl Appeal against the decree of the District Court of Coimbatore in Civil Appeal No. 288 of 1926, preferred against the decree of the Court of the District Munsif of Coimbatore in O. S. No. 1911 of 1926.

Dr. S. Swaminathan and *K. Desikachariar* for appellant.

T. M. Krishnaswami Aiyar and *K. Sankara Menon* for respondents.

The Court delivered the following

JUDGMENT :—The facts of this case may be shortly stated as follows. In anticipation of a vacancy to occur in the Municipal Council of the Coimbatore Municipality, the Chairman originally fixed the 29th of August for receiving nominations, the 1st September for the scrutiny of the nominations and the 9th September for the taking of the poll. Two candidates sent letters to the Chairman purporting to withdraw their candidature on the 7th September. Under R. 6 of the rules made by the Local Government these letters do not amount to proper withdrawals. On the 8th September the Chairman erroneously regarding the letters as proper withdrawals made a declaration that no poll was necessary. He apparently detected his mistake, dropped the proceedings and started fresh proceedings for election. He fixed the 23rd September for receiving nominations and the 4th October for polling. On the 1st October, the then sitting member declared his willingness to serve, but the Chairman, refusing to accept this as one which the member was entitled to make at that stage, started fresh election proceedings calling for nominations on the 8th October. On the 4th October this plaint was filed for a declaration that the plaintiff continued as a valid member under the Act. Both the lower

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courts have decided against the plaintiff and he files this Second Appeal.

The point to be decided turns on the meaning to be given to S. 9, clause 1 of the Act, which runs as follows:—

"If from any cause no councillor is elected at an ordinary election held under the previous section the retiring councillor shall, if willing to serve, be deemed to have been re-elected".

Dr. Swaminathan, the learned counsel for the plaintiff, argues that we ought to hold that an election has been held under the preceeding section but that it ended in no councillor being elected. He lays stress on the words 'if from any cause no councillor is elected' for his contention that the section covers all cases where elections have been contemplated but on account of various irregularities committed by the chairman or by others no councillor was elected. We are unable to agree with this contention. The section seems to apply only to cases where a valid election has been held under the previous section. The scheme of the Act shows that an election begins by the chairman fixing certain dates and ends with the date on which the polling is fixed. If serious irregularities going to the root of the proceedings happen in the course of such election, it may be that the election must be considered void, and in such cases it cannot be said that an election has been held within the meaning of section 9 (1). In the present case the existing member was anxious to declare his intention to continue as a member on the 1st October, that is, three days before the date fixed for the polling. One must wait until the lapse of that day to be able to say that an election has been held. Where one does not wait until that day it cannot be said that an election has been held. The result is nobody is in a position to state on the 1st October that a valid election has been held and that no councillor has been elected. It is not necessary for us to consider the remarks made by the learned District Judge on the language of S. 9. It is enough to say that we do not think that the words 'an ordinary election held under the previous section' are redundant. There may be cases where an election may be properly held without any councillor being elected. A simple case is where all the voters for some reason or other do not go to the polling station to exercise their franchise. Other cases may be conceived. We agree with the conclusion arrived at by the learned Judge in considering that this is not a case to which S. 9 applies.

The Second Appeal fails and is dismissed with costs.

A. S. V. *Appeal dismissed.*

[PRIVY COUNCIL].

[On appeal from the High Court of Judicature at Lahore.]

PRESENT :—LORD SINHA, LORD BLANESBURGH AND SIR JOHN WALLIS.

The Delhi Cloth and General Mills Company, Ltd. ... *Petitioners**

v.

The Income-tax Commissioner, Delhi, and another ... *Respondents*

P.-C.

The Delhi Cloth and General Mills Co., Ltd. v. The Income-tax Commissioner, Delhi.

Indian Income-tax Act, XI of 1922 (as amended by Act XXIV of 1926), Ss 66, 66-A—Civil Procedure Code, 1908, Ss 109, 110—Appeal to Privy Council—Retrospective operation of statute conferring right of appeal

Prior to the enactment of S. 66-A by the Indian Income-tax (Amendment) Act, XXIV of 1926, there was no statutory right of appeal at all to His Majesty in Council from orders of a High Court in India made upon references under S. 66 of the Indian Income-tax Act, XI of 1922. Ss. 109 and 110 of the Code of Civil Procedure, 1908, did not confer a right of appeal from such orders. *Tata Iron and Steel Co Ltd* v. *Chief Revenue Authority of Bombay,* (1923) L R 50 I A 212 . 45 M L J 295 (P C), relied on.

S. 66-A of the Indian Income-tax Act (inserted by the Amending Act, XXIV of 1926) confers a right of appeal to His Majesty in Council from the judgment of a High Court delivered on a reference made under S. 66 of the Act. But the appeal thereby given is, by the express terms of sub-section (2) of S. 66-A, confined to a case which the High Court certifies 'to be a fit one for appeal to His Majesty in Council' "These words are textually the same as the concluding words of sub-section (*c*) of S. 109 of the Code of Civil Procedure, and, coupled with the carefully limited referential words to the Code of Civil Procedure in sub-section (3) of S. 66-A, suffice, in their Lordships' judgment, to exclude from any right of appeal cases which fall within the requirements of S. 110 of the Code, and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council". In other words, notwithstanding the reference to the Code of Civil Procedure in sub-section (3) of S. 66-A, the statutory right of appeal conferred by the latter section is confined to the cases described in sub-section (2) (of S. 66-A) and is, consequently, conditional on compliance with the requirements of that sub-section.

"While provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Their lordships can have no doubt that provisions which, if applied retrospectively, would deprive of their existing finality orders which, when

*Petition for special leave. 26th July, 1927.

P. C.

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the statute came into force, were final (*i.e.*, unappealable), are provisions which touch existing rights", and such provisions are not, therefore, to be construed retrospectively. *Colonial Sugar Refining Company* v. *Irving* (1905 A. C. 369) referred to and applied.

Applying the principles enunciated above, the Judicial Committee held that S. 66-A, added by the Indian Income-tax (Amendment) Act, XXIV of 1926, which came into force on the 1st April, 1926, and conferred *for the first time* a right of appeal to His Majesty in Council, had no retrospective operation; and accordingly, there was (under that section) no appeal at all from an order of the High Court made before, and therefore final at the date, when the section came into force.

Petitions for special leave to appeal to His Majesty in Council from the orders of the High Court, Lahore, dated the 6th and 12th January, 1926, passed on references made under S. 66 of the Indian Income-tax Act, XI of 1922.

The petitioners, in the first instance, applied to the High Court, Lahore, for leave to appeal to His Majesty the King in Council from the aforesaid orders, and, on leave being refused by the High Court (Broadway and Zafar Ali, JJ.), the present petitions for special leave were preferred to His Majesty in Council.

The facts appear sufficiently from the judgment of the Judicail Committee, and also in the report of the case in the Court below; see *Delhi Cloth and General Mills Co.* v. *The Commissioner of Income-tax* (1).

For facility of reference, S. 66-A of the Indian Income-tax Act, as inserted by the Amending Act, XXIV of 1926, is set out below *in extenso*:—

66-A (References to be heard by Benches of High Courts, and appeal to lie in certain cases to Privy Council). (1) When any case has been referred to the High Court under S. 66, it shall be heard by a Bench of not less than two Judges of the High Court, and in respect of such case the provisions of S. 98 of the Code of Civil Procedure, 1908, shall, so far as may be, apply notwithstanding anything contained in the Letters Patent of any High Court established by Letters Patent or in any other law for the time being in force.

(2) An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under S. 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

(3) The provisions of the Code of Civil Procedure, 1908, relating to appeals to His Majesty in Council, shall, so far as may be, apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of a High Court:

Provided that nothing in this sub-section shall be deemed to affect the provisions of sub-section (5) or sub-section (7) of section 66:

1. (1926) I L R 8 Lah. 269.

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Provided, further, that the High Court may, on petition made for the execution of the order of His Majesty in Council in respect of any costs awarded thereby, transfer the order for execution to any Court subordinate to the High Court.

(4) Where the judgment of the High Court is varied or reversed in appeal under this section, effect shall be given to the order of His Majesty in Council in the manner provided in sub-sections (5) and (7) of S. 66 in the case of a judgment of the High Court.

(5) Nothing in this section shall be deemed

(*a*) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or (*b*) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

Lowndes K. C. and *Raikes* for petitioners.

Dunne K. C. and *K. Browne* for respondents.

Their Lordships' Judgment was delivered by

Lord Blanesburgh.

LORD BLANESBURGH :—These petitions are each of them for special leave to appeal from orders made by the High Court of Judicature at Lahore on references to that Court under Section 66 (2) of the Indian Income-tax Act, 1922. In each case the sum in dispute exceeds Rs. 10,000. In each the order in question was made before the 1st April, 1926—that in the first of the two cases being of date the 12th January, 1926, and that in the second having been made on the 6th January, 1926. In each case, also the High Court refused to certify that the case was a fit one for appeal to His Majesty in Council. With these facts for its foundation, an interesting argument was addressed to the Board upon the nature of the statutory appeal in such cases as these, and upon the question whether in the present instances there is any such appeal at all.

The learned Judges of the High Court were of opinion that the petitioners had a right of appeal to His Majesty in Council provided they could, in effect, bring their cases within the requirements of S. 109 (*c*) of the Code of Civil Procedure, but not otherwise. They dealt with the applications for certificates on that footing, and they dismissed them. Hence the present petitions.

At the hearing before the Board, the view of the High Court was resolutely challenged by the petitioners. It sufficed, it was contended, that the cases should fall within the requirements of S. 110 of the Code: the petitioners' right of appeal was in no way conditional on compliance with the requirements

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of S. 109 (c). The respondents, on the other hand, supported, as applied to the general case, the view of the High Court, but contended that, for the petitioners here, there was, for reasons which will appear in the sequel, no statutory right of appeal at all.

These rival contentions raise questions of great general importance. It has seemed to their Lordships to be convenient that they should definitely pronounce upon them.

The legislative history of the subject is a short one. No express provision for appeals to His Majesty in Council from orders of a High Court in India made upon references either under Section 51 of the Indian Income-tax Act, 1918, or under Section 66 of the Act of 1922, is to be found in either statute, but until the case of *Radhakrishna Aiyar* v. *Sundaraswamiar** (2) was decided by the Board, it was apparently generally supposed in India that appeals from such orders were regulated by Ss. 109 and 110 of the Code of Civil Procedure, to which reference has already been made. The effect of the judgment in the case cited was, however, definitely to lay it down that from these orders there was, in fact, no statutory right of appeal at all. And such was the position until the 1st April, 1926, when the Indian Income-tax (Amendment) Act, 1926, came into force, by S. 8 of which it is provided that immediately after Section 66 of the Indian Income-tax Act, 1922, a section should be inserted, of which it is convenient to transcribe the first three subsections :—

"66-A. (1) When any case has been referred to the High Court under S. 66, it shall be heard by a Bench of not less than two Judges of the High Court, and in respect of such case the provisions of S. 98 of the Code of Civil Procedure, 1908, shall, so far as may be, apply notwithstanding anything contained in the Letters Patent of any High Court established by Letters Patent or in any other law for he time being in force.

"(2) An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under S. 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council.

"(3) The provisions of the Code of Civil Proedure, 1908, relating to appeals to His Majesty in Council shall, so far as may be, apply in the case of appeals under this section in like manner as they apply in the case of appeals from decrees of a High Court."

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*This citation is a clerical error. The reference is to *Tata Iron and Steel Co, Ltd.* v. *Chief Revenue Authority of Bombay*, (1923) L R 50 I A 212 : I L R 47 B 724 . 45 M L J 295 (P C).—K. J. R.

2. (1922) L R 49 I A 211 : 43 M L J 323 (P C)

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It is upon these sub-sections that the question now under discussion depends, and as to them it will be noticed that the appeal thereby given is by sub-section 2 confined to a case which the High Court certifies "to be a fit one for appeal to His Majesty in Council." These words are textually the same as the concluding words of sub-section (*c*) of S 109 of the Code of Civil Procedure, and, coupled with the carefully limited referential words to the Code of Civil Procedure in sub-section 3, suffice, in their Lordships' judgment, to exclude from any right of appeal cases which fall within the requiiements of Section 110 of the Code, and are operative to confine that right to cases which are certified to be otherwise fit for appeal to His Majesty in Council. It was conceded in argument that if sub-section 2 of the section had stood alone, it would be difficult to escape from the construction of it which has just been indicated. It was contended, however, that the reference to the Code in sub-section 3 was made in terms sufficiently comprehensive to include within the class of appealable cases all that are defined in the provisions incorporated by reference. Their Lordships cannot agree with this contention. The words of qualification, "so far as may be," in sub-section 3 are, in their judgment, apt to confine the statutory right of appeal to the cases described in sub-section 2. To this extent, therefore, their Lordships are in agreement with the High Court.

But a further point remains. Is there under this section any appeal at all from an order of the High Court made before the Act of 1926 came into force?

The principle which their Lordships must apply in dealing with this matter has been authoritatively enunciated by the Board in the *Colonial Sugar Refining Company* v. *Irving* (3). where it is in effect laid down that, while provisions of a statute dealing merely with matters of proceedure may properly, unless that construction be textually inadmissible, have restrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. Their Lordships can have no doubt that provisions which, if applied restrospectively, would deprive of their existing finality orders which, when the statute came into force, were final, are provisions which touch existing rights. Accordingly, if the section now in question is to apply

3. L R (1905) A. C. 369.

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to orders final at the date when it came into force, it must be clearly so provided. Their Lordships cannot find in the section even an indication to that effect. On the contrary, they think there is a clear suggestion that a judgment of the High Court referred to in sub-seection 2 is one which under sub-section 1 has been pronounced by "not less than two Judges of the High Court," a condition which was not itself operative until the entire section came into force.

In their Lordships' judgment, therefore, the petitioners in these cases have no statutory right of appeal to His Majesty in Council. Only by an exercise of the Prerogative is either appeal admissible.

Both petitions their Lordships have, from this point of view, carefully considered. They have not forgotten that the circumstances are somewhat special : that the right of appeal introduced by the Act of 1926 is very probably conceded in order to rectify an omission inadvertently made from previous legislation, and is not one thought of for the first time. Even so, however, their Lordships are unable to find in the circumstances of either case sufficient ground for any exercise of the Prerogative in favour of the petitioners.

Their Lordships will accordingly humbly advise His Majesty that both petitions should be dismissed and with costs.

Solicitors for petitioners : *T. L. Wilson & Co.*

Solicitors for respondents : *Solicitor, India Office.*

K. J. R. *Special leave refused.*

[FULL BENCH.]

IN THE HICH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WILLIAM PHILLIPS, KT., *Officiating Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

F. B.

Narayanan Nambudiri v. Theva Amma.

A. Narayanan Nambudiri, Karnavan and Manager of Ettasseri Munnot Mangalath Illom ... *Appellant** (*1st Respt.*)

v.

Puthisseri Theva Amma and others ... *Respondents* (*Petitioners and 2nd Respt.*).

Civil Procedure Code, S. 47 & O 21, R. 58—Applicability—Malabar tarwad—Karnavan of—Decree in representative capacity against—Attachment

*A A A O No. 132 of 1925. 1st September 1927.

F. B.

Narayanan Nambudiri v. Thera Amma.

of tavazhi properties of some members of tarwad in execution of—Objection to, by those members—Procedure—Claim under O 21, R 58—Maintainability—Claimants not eo nomine *parties to decree or suit.*

Held by the Full Bench that the decision in *Marivuttil Mathu Amma* v. *Pathram Kunnot Cherukot,* (1906) I L R 30 Mad. 215 . 17 M L J 377, in so far as it laid down that members of a Malabar tarwad objecting to the attachment of certain properties, in execution of a decree obtained against the karnavan of the tarwad in his representative capacity, on the ground that the said properties belonged not to the tarwad but to a separate tavazhi to which the claimants belonged, must proceed under S. 244, and not under S. 278, of the Civil Procedure Code of 1882, was incorrect, and that the decision *Kamal Kutti* v. *Ibrayi* in (1901) I L R 24 Mad. 658 was also incorrect.

Per The Officiating Chief Justice :—Where a person is an actual party to a suit, his rights in any other capacity must be deemed to be rights of a party to the suit, and he must, consequently, come unter S. 47 of the Civil Procedure Code of 1908; but where he is not an actual party, but is merely a constructive party represented by another, he can only be deemed to be a party or representative of a party in the capacity in respect of which he was so represented. In any other capacity, more especially when such capacity is adverse to the person who represented him, he can in no sense be deemed to be a party to the decree or representative of a party.

Per Anantakrishna Aiyar, J. :—Claims that might be put forward in the course of execution of a decree obtained against only the karnavan of a Malabar tarwad in his representative capacity by members of the tarwad forming a tavazhi should not be dealt with as put forward by persons who are parties to the suit.

Appeal against the order of the Court of the Subordinate Judge of Tellicherry, dated 17th July, 1925, in A. S. No. 174 of 1925 (A. S. No. 28 of 1924, District Court), preferred against the order of the Court of the District Munsif of Quilandi, dated 10th November, 1923, in R. M. P. No. 1667 of 1923 in O. S. No. 345 of 1912.

K. Krishna menon for appellant.

K. P. Ramakrishna Aiyar for respondents Nos. 1 and 2.

The Court (*Devadoss and Madhavan Nair, JJ.*) delivered the following

Devadoss, J.

JUDGMENT :—*Devadoss, J.*—The only point for consideration in this appeal is whether an appeal lay to the lower appellate court from the order of the District Munsif on a petition filed under O. 21, R. 58, and S. 47, Civil Procedure Code. A decree was obtained in O. S. No. 345 of 1912 by one Narayanan Nambudri against Krishnan Nair and his brother Ramunni Nair for Rs. 344. Krishnan Nair was made liable as karnavan of the tarwad in addition to his personal liability. In execution of that decree certain moveables belonging to the tarwad were attached. The junior members objected to the

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attachment on the ground that the tarwad was not bound by the decree. They failed in their petition and 22 junior members brought O. S. No. 38 of 1920 to set aside the decree so far as the tarwad was concerned and they succeeded in the suit with the result that Krishnan Nair and Ramunni Nair were made personally liable for the decree amount. The decree-holder attached some of the properties of the tavazhi and the sister of Krishnan Nair and Ramunni Nair objected to the attachment on the ground that the properties belonged to the putravakasam tavazhi and that the judgment-debtors had no exclusive interest over it. This petition was presented under O 21, R. 58, and S. 47, Civil Procedure Code. The District Munsif dismissed that petition; on appeal to the lower appellate court, it was contended that no appeal lay as the members of the tavazhi were not parties to the suit. But the Subordinate Judge overruled that objection and on the merits allowed the appeal. Narayanan Nambudiri, the decree-holder, has filed this Civil Miscellaneous Appeal. The contention of Mr. Krishna Menon for the appellant is that the appeal to the lower appellate court was incompetent as the petitioners who objected to the attachment were not parties to the decree or their legal representatives.

To O. S. No. 345 of 1912 Krishnan Nair and Ramunni Nair were parties as well as the tarwad of which Krishnan Nair was the karnavan. The objection now put forward is that the property under attachment does not belong to the tarwad but is the property of the tavazhi which was not represented in the suit. The Subordinate Judge in paragraph 3 of his judgment says :

"No doubt the property is now claimed as belonging to a tavazhi within the common tarwad, but on the same principle the tavazhi must also be considered to have been a constructive party."

The argument of the Subordinate Judge amounts to this that if a tarwad is sued by making the karnavan a party or all the members of the tarwad parties, the tavazhis of which the tarwad is composed must necessarily be considered to be parties to the suit. This view is against the theory that a tavazhi is a distinct entity, so far as the holding of property is concerned, from the tarwad, and, though, according to the peculiar system of Malabar law, members of a tavazhi may form a tarwad, yet each tavazhi is entitled to own property separately and a tarwad cannot utilize the properties of the tavazhi for its purposes. In other words the tarwad and the tavazhi are two distinct entities or

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bodies for the purpose of owning property. The tavazhi property cannot benefit the members of the tarwad as a whole though the tavazhi members are entitled to get a share of the income of the tarwad property. This distinction unfortunately has not been given effect to in some of the decisions quoted at the bar. Even though all the members of a tarwad are made parties to a suit *eo nomine*, yet, if the suit is only against a tarwad, it would not be right to say that the tavazhi also was represented in the suit merely because the members of the tavazhi were made parties in their capacity as members of the tarwad. If a person occupies two distinct positions or fills two different offices, his being sued in his capacity as representing one body cannot be held as his being sued in another capacity representing another body which was not sued. Suppose A and B are the trustees of a certain trust; suppose they also happen to be the trustees of another trust. If a suit is brought against them in respect of one trust, would it be right to say that they being the trustees of the second trust it must be held that the second trust was a party to the suit in order to attract the provisions of S. 47 of the Code of Civil Procedure. When the karnavan of a tarwad is sued as karnavan, I think, it would not only be doing violence to language but it would be against all principles of construction of pleadings to hold that he is also sued as representing the tavazhi. Where he is sued as representing the tarwad and the tavazhi, it may be said that he must be taken to represent both in the suit. But where the suit is confined to some relief against the tarwad only, I think it would be opposed to all principles of justice to hold that he must be taken to have represented the tavazhi. It is not the name of the person that is of importance but the substance and the nature of the suit. With these observations I proceed to consider the cases relied on by both the parties.

Mr. Krishna Menon relies upon a recent deicsion of this Court reported in *Peetikayilakath Mammad Haji* v. *Alam Ibran Haji* (1).The facts in that case were:*A* obtained a decree against the anandravan of a Malabar tarwad and in execution thereof attached certain immovable properties in possession of the judgment-debtor. He died, but on his death, the karnavan of the tarwad was brought on the record as his legal representative. He set up the claim of the tarwad to the property, and contended that the judgment-debtor had no partible interest in the property and it was not attachable. The District Munsif dismiss-

1. (1915) 31 I C 393.

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ed the petition and on appeal by the karnavan the appellate court set aside the attachment. Against that order a revision petition was filed in the High Court. The question was raised whether an appeal lay to the lower appellate court. Justice Abdur Rahim and Justice Spencer held that no appeal lay to the lower appellate court and that the point was covered by the Full Bench case in *Ramanathan Chettiar* v *Levvai Marakayar* (2) and a decision of the Calcutta High Court in *Kartic Chandra Ghose* v. *Ashutosh Dhara* (3). They observe at page 394 :

"The claim that he put forward in respect of the property was that it belonyed not to the judgment-debtor, but to the tarwad. There seems to us no distinction in principle between this case and the case in which the person who was a party to the suit or was brought on record as a representative of the judgment-debtor claimed the property as the trustee for certain other persons or as Shebait of a temple"

This decision in *Peetikayilakath Mammad Haji* v. *Alam Ibran Haji* (1) was followed by Sadasiva Aiyar and Phillips, JJ., in Second Appeal No. 1 of 1916. The opening lines of that judgment make the point clear:—

"The plaintiffs' Thiyya Makkathayam Tarwad was not impleaded as the legal representative of the judgment-debtor Ramutty in the proceedings in execution in the former suit. Five of the present plaintiffs were impleaded as such legal representatives in their individual capacity as sons and therefore heirs of Ramutty to his self-acquired and separate properties The plaintiffs therefore as representing the tarwad were not bound to make an application under S. 47 of the Code of Civil Procedure for redelivery of the property which belonged to the tarwad and which the decree-holder-purchaser wrongfully took possession of in execution, though it was neither attached nor sold in execution They (plaintiffs) as representing the tarwad (a third party) were entitled to bring a separate suit to recover possession of the property so wrongfully taken possession of by the decree-holder-purchaser [*Ramanathan Chettiar* v *Levvai Marakayar* (2)]."

The law has been clearly laid down by Abdur Rahim and Spencer, JJ., in *Peetikayilakath Mammad Haji* v. *Alam Ibran Haji* (1) and, though one sentence in that judgment about *Kuriyali* v *Mayan* (4) may be inaccurate as pointed out in *Kelu Achan* v. *Parasu Pattar* (5), the reasoning in that decision seems to us to be unimpeachable. Following *Ramanathan Chettiar* v. *Levvai Marakayar* (2) and *Peetikayilakath Mammad Haji* v *Alam Ibran Haji* (1), we hold that a separate suit can be brought by the plaintiffs' tarwad as it is not the legal representative of Ramutty"

This clearly shows that, where the tarwad is not brought in as the legal representative of a deceased judgment-debtor, and if any of its property is attached, it can

1. (1915) 31 I C 393. 2. (1899) I L R 23 M 195: 10 M L J 64 (F B).
3. (1911) I L R 39 C 298 (F B) 4. (1883) I L R 7 M 255.
5. (1916) 5 L W 158.

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apply under O. 21, R. 58, as it is not a party either to the suit or the execution proceedings.

The facts in *Ramanathan Chettiar* v. *Levvai Marakayar* (2) were : a decree-holder having attached certain property in the course of execution, two of the defendants in the suit in which the decree was passed presented a petition that the property may be released from the attachment on the ground that it had been set apart for charitable purposes and that it was held by the defendants as trustees. The Subordinate Judge upheld the trust and ordered the properties to be released from the attachment. The plaintiff then appealed to the High Court and a preliminary objection was taken to the appeal on the ground that no appeal lay against the order of the Subordinate Judge. The point was referred to a Full Bench and it held that the claim fell under S.278 and not under S.244 of the Code of Civil Procedure and that no appeal lay against an order passed by the Court executing the decree. It was further held that the claims of third parties whether put forward by themselves or by a party to the suit must be dealt with under Ss. 278 to 283 and not under S. 244. Mr. Justice O'Farrell, who delivered the leading judgment in that case, observe at page 200:

"I think, however, that there can be no doubt that the balance of authority is in favour of the view that the claims of third parties, whether put forward by themselves or by a party to the suit, must be dealt with under Ss. 278 to 283 and not under S. 244."

He further observes

"the Court should look to the substance of the objection, and not to the accident that it is put forward by *A* rather than by *B* If it is, in substance, an objection that falls under S. 278, it should be dealt with under that section"

and he observes that this view is in accordance with a number of cases cited by him. This decision is right in principle if I may say so. If *A* is sued in his individual capacity, property of which he is only a trustee cannot be attached and brought to sale in execution of a personal decree against him, and, if such property is attached, the proper course is for him to apply under O. 21, R. 58 of the present Code corresponding to S. 278 of old Code. The mere fact that a person is a party to a suit in his personal capacity does not make the trust of which he is a trustee a party to the suit. The question is complicated by the peculiar system obtaining in Malabar under which the tavazhis which compose a tarwad are distinct legal entities from the tarwad itself so far as the ownership of property is concerned. All

2. (1899) I L R 23 M 195 : 10 M L J 64 (F B).

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the members of the tarwad are entitled to be maintained out of the income of the property of the tarwad. Even though some of the members may be members of a tavazhi which is rich, yet they as members of the tarwad are entitled to receive maintenance from the tarwad, so that the tarwad and the tavazhi cannot be said to be one and the same judicial person, and, when a tarwad is sued as such either by making the karnavan or all the members of the tarwad parties, the suit is not one against any or all the tavazhis composing the tarwad.

Mr. Ramakrishna Aiyar for the respondent very strongly relies upon *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6) as supporting his contention that an appeal in this case lay to the lower appellate court. The facts in that case were: A decree was obtained against the karnavan of a tarwad. In execution of that decree certain properties were attached and some of the members of the tarwad put in a petition for release of the properties attached on the ground that the properties belonged not to the common tarwad but to their own tavazhi. The petition was rejected. On appeal the Subordinate Judge of South Malabar held that no appeal lay to his Court. The expression District Court in the report is obviously a mistake for Sub-Court. A Civil Miscellaneous Appeal was presented to the High Court against the order of the Sub-Court. A bench of this Court consisting of Justice Benson and Justice Wallis held that an appeal lay. Benson, J., observed:

> "Not only defendants 2 to 6 but also all the members of the tavazhi must be held to be bound by the decree against the tarwad and parties to the suit on the principle laid in *Kamal Kutti* v *Ibrayi* (7)."

Wallis, J., observed:

> "In this case a decree has been given against the karnavan as representing the members of the whole tarwad. In accordance with the decision in *Kamal Kutti* v. *Ibrayi* (7) all the members of the tarwad must be taken to be parties to the suit for the purpose of execution proceedings, and, if parties, they must proceed under S. 244 and not under S. 278. The fact that they claimed the property, which has been attached, adversely to the other members of the tarwad, does not make them any the less constructive parties to the decree."

He refers to *Ramanathan Chettiar* v. *Levvai Marakayar* (2) and says:

> "a defendant who objected to the attachment of property of which he was a trustee was allowed to proceed under S. 278, because he was

2. (1899) I L R 23 M 195 : 10 M L J 64 (F B).
6. (1906) I L R 30 M 215 : 17 M L J 377.
7. (1901) I L R 24 M 658.

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claiming as trustee on behalf of persons who were not parties to the suit; and similarly in *Abdurrahiman Kutti Haji* v. *Kunhammad Koya* (8)."

With very great respect to the learned Judges, I must observe that they did not keep before them the distinction between a tarwad and a tavazhi. The mere fact that the tarwad members are members of the tavazhi would not make the tavazhi a party to a suit in which the tarwad alone is concerned. Though this decision may be distinguished from the present, on the facts, I think the better course would be to canvass the correctness of this decision, for the learned Judges have expressed themselves in such a wide language that it would not be right to go behind the plain meaning of their language by making reference to the facts of the case. If the principle of this decision is that when a tarwad is sued in the name of the karnavan, the karnavan being the representative of all the anandravans, all the tavazhis which compose the tarwad must be considered to be parties to the litigation, I am unable to accept any such proposition as correct. When there are two separate bodies which can hold properties independently of one another and whose interests may clash with one another, it cannot be said that one represents the other simply by reason that for some purposes the members composing the one happen to be members composing the other. If this decision had been consistently followed in a number of cases one should hesitate before questioning its correctness. Though the matter has been fully argued and though we gave every opportunity to both the parties to refer to the cases in which this decision has been followed, we have not been referred to any case in which the principle of this decision was given effect to. In *Rangoon Pattar* v. *Lakshmi Neithiar* (9), it was held that

"an objection by a defendant that immovable property attached in execution of a decree is not the private property of the judgment-debtor but that of the tavazhi consisting of the defendant, the judgment-debtor and others is one falling within S. 244 of the Code of Civil Procedure and an appeal will lie from the order of the Court of First Instance."

The facts were: A decree was obtained against defendants 1 to 3. In execution of the decree, the properties in dispute were attached. The 6th defendant objected to the attachment on the ground that the properties were not the private properties of defendants 2 and 3 but belonged to a tavazhi consisting of defendants 1 to 9. The District Munsif rejected the claim. On appeal, the Subordinate Judge held that it was the property of the tavazhi and directed the raising of the attachment. From

8. (1900) 10 M L J 85. 9. (1902) 14 M L J 137.

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the facts it is clear that the properties were gifted to the 2nd and 3rd defendants and the question was whether the gift was exclusively for the 2nd and 3rd defendants or for the tavazhi which they represented. Arnold White, Chief Justice, and Justice Bashyam Aiyangar held that this point was covered by the Full Bench ruling in *Ramaswami Sastrulu* v. *Kameswaramma* (10). In this case, the question was whether it was the property of defendants 2 and 3 or the property which belonged to them as well as to the other members of the tavazhi, and it is distinguishable from the cases in *Peetikayilakath Mammad Haji* v. *Alam Ibran Haji* (1) and *Ramanathan Chettiar* v. *Levvai Marakayar* (2). Where a person is sued and property belonging to him and some others is attached, a claim has to be made only under S. 47, for the property which is attached belongs to him though it belongs to others as well. But when he is sued in one capacity he cannot be said to be sued in all the capacities in which he could be sued. In other words when one institution is used, it cannot be said that another institution of which the defendant happened to be the manager or trustee is also sued.

Kelu Achan v. *Parasu Pattar* (5) is relied upon by Mr. Ramakrishna Aiyar. In that case a decree was obtained against an anandravan of a Malabar tarwad. Certain properties alleged to belong to him were attached after his death, and the karnavan of the tarwad was brought on the record as the legal representative of the deceased anandravan. He contended that the attached properties had been appropriated towards a debt due from the anandravan. The Subordinate Judge held that the karnavan was not the legal representative of the anandravan and under the above circumstances rejected the tarwad's petition. On appeal, the District Judge held that no appeal lay to him as the matter arose in claim proceedings. The High Court held that an appeal lay. Ayling and Seshagiri Aiyar, JJ., after referring to a number of cases, observed:

> "Thus there has been a course of decisions in this Presidency which has recognized the correctness of the principle that where a person's claim is traceable to the same capacity in which he is brought in as the legal representative, the executing Court should hear and determine the matter."

This observation is not against the principle of the decision in *Ramanathan Chettiar* v. *Levvai Marakayar* (2). The real

1. (1915) 31 I C 393.
2. (1899) I L R 23 M 195 : 10 M L J 64 (F B).
5. (1916) 5 L W 158.
10. (1900) I L R 23 M 361 : 10 M L J 126 (F B).

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question is in what capacity was the defendant impleaded in the suit. If he was impleaded in the suit in one capacity, he cannot be held to have been impleaded in another capacity so as to prevent him from putting forward the claim of the body which was not made a party to the suit. The decision in *Meyyappa Chetty* v. *Chidambaram Chetty* (11) has nothing to do with the present question. In C M. A. No. 143 of 1920 this point is not discussed Ayling and Venkatasubba Rao, JJ., observed:

"It is specifically stated by the District Munsif in his order on the claim petition that the case fell under S. 47, Civil Procedure Code, and we must take it that his order was passed under that section. This being so, an appeal lies [vide *Lakshmanan Chetty* v. *Ramanathan Chetty* (12)]. No matter whether the petition should properly have been treated as one under O. 21, R. 58, or not."

In Second Appeal No. 647 of 1921 the karnavan of a tarwad was made a defendant to a suit. The decree was finally passed exonerating the tavazhi properties altogether and the decree was only against the assets of one Raman Nair in the hands of the 3rd defendant as his legal representative. The learned Judge observed that

"as the karnavan of the tavazhi was joined in the suit by the 1st defendant in his capacity as karnavan, I must hold that the other members of the tavazhi are constructively parties to that suit and the plaintiff must also be treated as if he was a party and his remedy in putting forward the claim of the tavazhi is by way of an application under S. 47 and not by a suit."

This case does not touch the present point. Where a person is a party to a suit, even though he may be exonerated, still for the purposes of S. 47 he is a party. This is clear from the Full Bench ruling in *Sannamma* v. *Radhabhayi* (13) and from the explanation to S. 47.

The decision in *Chowdry Wahed Ali* v. *Mussamut Jumaee* (14) is discussed in *Ramanathan Chettiar* v. *Levvai Marakayar* (2) and it is unnecessary to discuss it here. The case in *V. T. Arunachellam Chetty* v. *Maung San Ngwe* (15) does not help the respondent. There it was held that where a person is brought on the record as a legal representative of the deceased judgment-debtor, the question, whether the property attached is

2. (1899) I L R 23 M 195 at p. 199 : 10 M L J 64 (F B).
11. (1920) 39 M L J 603.
12. (1904) I L R 28 M 127 : 14 M L J 436.
13. (1917) I L R 41 M 418 : 34 M L J 17 (F B).
14. (1872) 11 B L R 149 (P C). 15. (1924) I L R 2 R 168.

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part of the assets or his own property, is one arising under S. 47, Civil Procedure Code. In cases of persons who are brought in as legal representatives, they represent the deceased person, and any question as to what or what is not the property of the deceased is a question which naturally arises under S 47. If improperly the legal representative's separate property or private property is attached, he has to show that it is not part of the assets of the deceased. But that is different from saying that, where a person is brought in as the legal representative in possession of the assets of the deceased person, he cannot set up the right of a trust which had nothing to do with the deceased person. The question is not one of form but one of substance. S. 47 is clear. All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, etc., shall be determined by the the Court executing the decree. It must be first a question arising between the parties to the suit or legal representatives and must relate to execution, etc. But, where property which is attached or which is sought to be proceeded against is not the the property of a party to the suit, I fail to see how an application in respect of it could come under S. 47. It can only come in under O. 21, R. 58. The decisions in *Vengapayyan* v. *Karimpanakal Parvati* (16) and *Sivarama Sastrial* v. *Somasundara Mudali* (17) do not touch the present question. On the facts, in *Sivarama Sastrial* v. *Somasundara Mudali* (17) it was held that S. 244, Civil Procedure Code, applied, for the person putting forward the claim put it forward on the ground that he stood in the shoes of the person who was the party to the suit in which the decree was passed.

As the decision in *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6) is opposed to the Full Bench ruling in *Ramanathan Chettiar* v. *Levvai Marakayar* (2), we should follow the Full Bench ruling in preference to the ruling of a bench, but, as the matter is one of considerable importance and as it is likely to arise very often, I would refer the following question to the Full Bench:—

"Is the decision in *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6) correct?"

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Madhavan Nair, J.—The Full Bench is requested to examine the correctness of the decision in *Marivittil Mathu*

2. (1899) I L R 23 M 195 : 10 M L J 64 (F B).
6. (1906) I L R 30 M 215 : 17 M L J 377.
16. (1902) I L R 26 M 501. 17. (1904) I L R 28 M 119 at p. 121.

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Amma v. *Pathram Kunnot Cherukot* (6). I do not object to this reference. But speaking for myself, I am quite content to stand by the decision in *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6). The question is essentially one of procedure and if the procedure has been well understood and has been followed for a long number of years, I think it is not desirable to set about altering it even if it is not deemed to be correct according to the strict letter of the law. Neither party has been able to refer to cases which have reached this Court wherein this Court has expressly followed *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6) or refused to follow it. The paucity of the decisions would rather suggest that the procedure is wall understood; but however that may be, I am not satisfied that *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6) requires re-consideration.

The two decisions that are relied on as departing from the principle embodied in *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6) are (1) *Peetikayilakath Mammad Haji* v. *Alam Ibran Haji* (1) and (2) Second Appeal No. 1 of 1916. The facts in *Peetikayilakath Mammad Haji* v. *Alam Ibran Haji* (1) are stated in my learned brother's judgment. It would appear that *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6) is referred to neither in the arguments of the Counsel who appeared in the case nor in the judgment. In that case, on the death of an anandravan against whom a decree was obtained, the karnavan of the tarwad was brought on the record as his legal representative in the course of execution, and he put forward title to the property on behalf of the tarwad. The judgment is based on the ground that as the anandravan cannot be said to represent the tarwad, the tarwad was not constructively a party to the suit; and as the karnavan was putting forward a claim on behalf of those who were not parties to the suit, it was held that the claim put forward by him could not be investigated under S. 47 of the Code of Civil Procedure. This decision in no way departs from the principle laid down in *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6). Second Appeal No. 1 of 1916 followed the decision in *Peetikayilakath Mammad Haji* v. *Alam Ibran Haji* (1). The Full Bench decision in *Ramanathan Chettiar* v. *Levvai Marakayar* (2) is referred to and distinguished in the

1. (1915) 31 I C 393. 6. (1906) I L R 30 M 215 : 17 M L J 374.
2. (1899) I L R 23 M 195 : 10 M L J 64 (F B).

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judgment in *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6). The other decisions referred to, as pointed out by my learned brother, do not bear directly on the question. That a karnavan of a Malabar tarwad, sued as such, represents constructively all the members of the tarwad and a decree so obtained against him is binding on the tarwad was laid down as early as *Vasudevan* v. *Sankaran* (18), and this principle was made applicable to execution proceedings in *Kamal Kutti* v. *Ibrayi* (7) and *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6). Without calling into question the correctness of the Full Bench decision in *Vasudevan* v. *Sankaran* (18), I do not think it is possible to re-consider *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6). As observed in *Kamal Kutti* v. *Ibrayi* (7),

> "to allow the junior members to make a claim as strangers under S. 244 of the Code of Civil Procedure (S. 47 of the present Code) seems to be inconsistent with their being bound by the decree and with the policy of S. 244 and of the decision in *Vasudevan* v. *Sankaran* (18)".

I do not think that the fact that the tarwad and tavazhi are two distinct entities capable of owning separate property has been ignored in *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6) or in any of the decisions applying the principle embodied in it. For the sake of convenience, the karnavan is recognised as representing the entire tarwad in a suit when he is made a party to it as karnavan. The fact that the members of the tarward fall into various tavazhis does not in any way affect the representative character of the karnavan when he is sued as the karnavan representing the entire tarwad, which, of course, includes all the tavazhis. The interests of the tavazhi, which may be adverse, are not jeopardized by this procedure. So far as the decree binds the tarwad, no one can question it; but if the tavazhi properties are attached in the course of execution of that decree, the tavazhi, if it has any right, may put forward its claim to the attached properties. When this is done, the question raised will be one between parties to the suit and will relate to the execution, discharge or satisfaction of the decree, and section 47 of the Code of Civil Procedure will be applicable to such proceedings.

On the facts, it is possible to distinguish the present case from the decision in *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6), as the decision in the subsequent suit

6. (1906) I L R 30 M 215 : 17 M L J 377. 7. (1901) I L R 24 M 658.
18. (1897) I L R 20 M 129 : 7 M L J 102 (F B).

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by the junior members may be said to convert the decree under execution into a decree merely against two individual members of the tarwad one of whom happened to be the karnavan. However, as I have said, though I am willing to stand by that decision, I have no objection to the question decided in it being referred to a Full Bench for fresh consideration.

K. Krishna Menon for appellant.

K. P. Ramakrishna Aiyar for respondents Nos. 1 and 2.

The Court expressed the following

Sir William Phillips, O.C.J.

OPINION :—*The Officiating Chief Justice* :—The question that has been referred for our opinion is:

"Is the decision in *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6) correct?"

In that decision it was held that, where a decree is passed against the karnavan of a tarwad in his representative capacity, all the members of the tarwad must be held to be parties to the suit and such members in execution proceedings must proceed under S. 244 of the Code of Civil Procedure and not under S. 278. The decree had been passed against the tarwad, but certain members of the tarwad objected to the attachment of certain properties on the ground that they belonged not to the tarwad but to a separate tavazhi to which the claimants belonged. In order to consider the validity of this decision, it is necessary to consider the decision in *Kamal Kutti* v. *Ibrayi* (7) which was relied on as authority for it. In *Kamal Kutti* v. *Ibrayi* (7), the decree had been passed against the karnavan of the tarwad as senior member and manager and it was held that members of the tarwad who claimed certain property in their individual right must be deemed to be parties, or representatives of parties, to the decree and, as such, any claim made by them came within S. 244 of the Civil Procedure Code (S. 47 of the present Code). The judgment is that of Shephard and Benson, JJ. Benson, J., who was also a party to *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6), wrote the leading judgment in *Kamal Kutti* v. *Ibrayi* (7), whereas Shephard, J., merely said

"I concur, though I must say that I have had considerable doubt about the question."

The decision is based upon the Full Bench ruling in *Vasudevan* v. *Sankaran* (18), where it was held that a decree against the karnavan of a tarwad sued as such in a suit which

6. (1906) I L R 30 M 215 : 17 M L J 377. 7. (1901) I L R 24 M 658.
18. (1897) 20 M 129 : 7 M L J 102 (F B).

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he defended *bona fide* was binding on all the members of the tarwad, as they must be deemed to be represented in that suit by their karnavan. It must be observed that it was only as members of the tarwad that they were so represented and not in any other capacity that they might hold. Therefore, the decision in *Kamal Kutti* v. *Ibrayi* (7), in which it was held that members of the tarwad in their individual capacity and not as members of the tarwad must also be deemed to be parties to the decree, is a considerable extension of the principle laid down in *Vasudevan* v. *Sankaran* (18). The karnavan undoubtedly represents the members of the tarwad as such, and the decision in *Vasudevan* v. *Sankaran* (18) is merely to that effect; but to go further and say that he represents them in any other capacity, *e. g.*, as members of a separate tavazhi, or as individual owners, whose interests may be, and probably are, opposed to the interests of the tarwad, seems to be contrary to the principle of the decision. In fact, in *Ramanathan Chettiar* v. *Levvai Marakkayar* (2), it was held by a Full Bench of this Court that, when a decree had been obtained against a person in his individual capacity, a claim by him as a trustee for others who were not parties to the decree was one that fell under S. 278 of the Civil Procedure Code and not under S. 244. The *ratio decidendi* of this case is that the persons interested in the trust had not been parties to the decree and, consequently, were not bound by it, and, therefore, any claim made by them was a claim made by a stranger to the decree. It is difficult to distinguish this case on principle from *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6) and *Kamal Kutti* v. *Ibrayi* (7). As members of the tarwad, the claimants in both cases were deemed to be constructive parties to the decree; but their interests as members of a tavazhi or as individual owners were not represented at all in the suit, which was concerned merely with their interests as members of the tarwad. If they were not represented in their individual capacity in the suit, it is difficult to see how they could be deemed to be parties even constructively to the decree. They were not actual parties and, therefore, they could only come under S. 244 (now S. 47) if they were representatives of the parties; but it is not in their capacity as representatives of the parties that they now come forward with their claim, but as representing them-

2. (1899) I L R 23 M 195 : 10 M L J 64 (F B).
6. (1906) I L R 30 M 215: 17 M L J 377. 7. (1901) I L R 24 M 658.
18. (1897) 20 M 129 : 7 M L J 102 (F B).

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selves, whose interests are adverse to those of the karnavan, who is deemed to be their representative in so far as they were members of the tarwad. Hence it would appear that they, in their individual capacity, were not represented in the suit and cannot, therefore, be held to be representatives of parties to the suit. The conclusion, therefore, is that, in accordance with the Full Bench decision in *Ramanathan Chettiar* v. *Levvai Marakkayar* (2) the decisions in *Kamal Kutti* v. *Ibrayi* (7) and *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6) are wrong. If the claimants had been impleaded in the suit personally, they would undoubtedly be parties and would come within the meaning of S. 47, although the interests put forward in execution might not be the interests in respect of which they were made parties, for it has been held that, when a trustee is sued in his capacity as trustee and in execution puts forward his individual rights, he must be deemed to be a party to the suit also in his individual capacity. Where, therefore, a person is an actual party to the suit, his rights in any other capacity must be deemed to be rights of a party to the suit and he must, consequently, come under S. 47 of the Civil Procedure Code; but when he is not an actual party, but is merely a constructive party represented by another, he can only be deemed to be a party or representative of a party in the capacity in respect of which he was so represented. In any other capacity, more especially when such capacity is adverse to the person who represented him, he can in no sense be deemed to be a party to a decree or representative of a party.

The decision in *Kamal Kutti* v. *Ibrayi* (7) has stood for many years and it is contended on the principle of *stare decisis* that it should be upheld. We see, however, that it was a decision of one Judge in which the second Judge reluctantly concurred. The correctness of the decision has also been doubted by the late Mr. Justice Sundara Aiyar in his Treatise on Malabar and Aliyasantana Law and he was undoubtedly a great authority on Malabar Law. The decision was also not followed in *Peetikayilakath Mammad Haji* v. *Alam Ibran Haji* (1) and in Second Appeal No. 1 of 1916 (unreported). If therefore the decisions are not correct in law they cannot be upheld, even though they relate merely to a question of procedure. On reference to the papers in *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6), it would appear that the karnavan

1. (1915) 31 I C 393. 2. (1899) I L R 23 M 195 : 10 M L J 64 (F. B.).
6. (1906) I L R 30 M 215 : 17 M L J 377. 7. (1901) I L R 24 M 658.

F. B.

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of the tavazhi was an actual party to the decree and on that ground the decision may be correct; but as the judgment did not proceed upon that basis, we must answer the question referred to us in the negative, and this will have the further effect of overruling *Kamal Kutti* v. *Ibrayi* (7) also.

Beasley, J.

Beasley, J.—I agree.

Ananta-Krishna Aiyar, J.

Anantakrishna Aiyar, J.—I agree with my Lord. The circumstance that a money decree obtained against the tarwad karnavan as such is binding on all the members of the tarwad does not make the other members *parties* to the suit. Under ordinary circumstances their interests in the tarwad property should be deemed to have been represented by the karnavan and it is only in this sense that the decree obtained against the karnavan in his representative capacity is binding on the other members. *Vasudevan* v. *Sankaran* (18). The karnavan is taken to sufficiently represent also their interests in the tarwad property, the interests of the karnavan and the junior members in respect of the tarwad property with reference to such suit being ordinarily the same. From this circumstance that the decree is thus binding on the tarwad including the interests of junior members in the tarwad properties, it does not follow that the junior members are parties to the suit. Similarly under S. 11 of Civil Procedure Code, Explanation 6,

"when persons litigate *bona fide* in respect of a right claimed in common for themselves and others, all persons interested in such right shall for purposes of this section be deemed to claim under the person so litigating."

This does not, I think, make all the other persons so interested parties to the suit.

It appears to me that it does not follow that because a decision is binding upon a person, therefore he must be taken to be a *party* to the suit. *Prima facie* only those are parties to the suit within the meaning of S. 47, Civil Procedure Code, whose names appear in the decree. If any person's name so appears, then all questions raised by him relating to the execution, etc., of the decree should be determined in the execution department, and not by a separate suit. If his name does not so appear, then the next question is—were his interests (that is, those put forward by him) represented in the suit. He may have his own separate or private interests, and he may have his common interests in the tarwad properties as a member of the tarwad.

7. (1901) I L R 24 M 658.
18. (1897) I L R 20 M 129 . 7 M L J 102 (F B).

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If only his common interests in the tarwad were represented, then it seems to me it is impossible to hold that his other interests (separate and private interests) should also be taken to have been represented in the suit, with the result that if in execution proceedings occasion arises for putting forward such separate and private interests, he should be treated not as a stranger qua-such interests but as a party to the suit within the meaning of S. 47, Civil Procedure Code. The same remarks would apply to interests as co-owners possessed by two of the junior members of the tarwad in respect of some property owned by those two only as co-owners. The same remarks would also apply to properties owned by some only of the members of a tarwad as their exclusive tavazhi properties. It seems to me that in cases where such members were not *eo nomine* parties to the decree, and where only the karnavan of the whole tarwad was sued as such, the claims that might be put forward in the course of execution of such decree by the joint co-owner members or the tavazhi members aforesaid should not be dealt with as put forward by persons who are parties to the suit. Ordinarily the karnavan of a tarwad, as such, has no concern with the private and separate properties of the junior members or of any tavazhi. But on the other hand it often happens that his interests as karnavan representing the tarwad are adverse to the separate interests put forward by the junior members or the tavazhi in the circumstances mentioned above. The present case is not even complicated by any permission of Court granted under O. 1, R. 8, Civil Procedure Code. The decision in *Marivittil Mathu Amma* v. *Pathram Kunnot Cherukot* (6) is based on the authority of the decision in *Kamal Kutti* v. *Ibrayi* (7). Justice Shephard had considerable doubt about the question. If the principle laid down by Benson, J., in *Kamal Kutti* v. *Ibrayi* (7) should be accepted, it would seem to follow that in the case of a decree obtained only against a Hindu father or joint family manager as such, claims preferred by other members of the joint family setting up private and exclusive right to properties attached would have to be decided under S. 47 of the Code; as also similar claims put forward by *cestui que trust* when their private and separate properties not included in the trust are sought to be proceeded against in execution of decrees obtained against the trustees only as such. I am not prepared to place such a construction on S. 47 which would involve the above

6. (1906) I L R 30 M 215 : 17 M L J 377. 7. (1901) 24 M 658.

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consequences. In *Kamal Kutti* v. *Ibrayi* (7) the learned Judge argues :

"If the decree can be executed against them (junior members) does not this imply that they are parties or representatives of parties?"

With all respect, it is difficult to understand how a decree for money obtained against the karnavan alone as such could be executed *against the junior members.* Such a decree could be executed against the tarwad properties, but not against the junior members. If the learned Judge was right in saying that such a decree could be executed against the junior members, then the conclusion reached by him would of course be correct.

I accordingly agree in answering the question referred to us in the negative.

A. S. V. *Answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Narayana Doss Balakrishna Doss ... *Plaintiff**

v.

Buchraj Chordia Sowcar and 2 others ... *Defendants.*

Narayana Doss Balakrishna Doss v. Buchraj Chordia Sowcar.

Indian Contract Act, S. 17—Undue influence—Confidential relationship—Third party involved—Effect.

In a suit for setting aside a mortgage executed by the plaintiff in favour of the 1st defendant on the ground of undue influence, it was found that the plaintiff, after the death of his father in 1914, lived with his maternal uncle the 2nd defendant, he being 9 years old then, that in 1917, when the plaintiff was 12 years old, there was a partition of the family properties in which the plaintiff was represented by his mother and 2nd defendant as guardians, that immediately after the partition a trust deed was executed constituting the 2nd defendant and another as trustees for managing the properties allotted to the plaintiff's share, that after 1921 the 2nd defendant acted as the sole trustee consequent on the death of the other trustee, that the plaintiff was much attached to the 2nd defendant and practically lived as his ward preferring his protection to that of his mother and his paternal uncle, that in 1925 the 2nd defendant's financial position became extremely precarious with the result that he was practically a bankrupt, that the 1st defendant to whom the 2nd defendant owed a large sum of Rs. 24,000 brought pressure to bear upon him for the repayment of this amount, that on 14th August, 1925, the plaintiff, who was then 20 years old, executed the suit mortgage in favour of the 1st defendant on the security of all the properties belonging to him in discharge of the debt due by the 2nd defendant, that the plaintiff derived no personal advantage whatever by this transaction, that, about two weeks after the date of the mortgage, the 2nd defendant applied to the Court to be discharged

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*C. S. No. 519 of 1926. 8th August, 1927.

7. (1901) 24 M 658.

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from the office of trustee, that neither the 1st nor the second defendant directed the plaintiff to seek independant or disinterested advice before executing the mortgage, though the 1st defendant was aware that the plaintiff had his mother and paternal uncle, that the 1st defendant was aware of the plaintiff's age on the date of the execution of the mortgage and of the peculiar relations between the plaintiff and the 2nd defendant by reason of the trust deed, and that the plaintiff did not seek the advice of any disinterested person before executing the suit mortgage.

Held that, on these findings, the mortgage should be set aside as having been vitiated by undue influence. Principles regarding the doctrine of undue influence arising out of the existence of confidential relationship, especially when a third party is involved, stated and discussed with reference to decided cases.

Raj Coomar Roy v. *Alfasuddin Ahmed,* (1881) 8 C. L. R. 419, dissented from.

V. C. Gopalaratnam for plaintiff.

M. P. Sundararaja Aiyar and *G. Ramakrishna* Aiyar for defendants 1 and 2.

The Court delivered the following

JUDGMENT :—The plaintiff in this suit impeaches a mortgage executed by him. The 2nd defendant Purushothamdas is his maternal uncle and he became indebted to the 1st defendant, a money lender, in a large sum of money. When Purushothamdas was pressed for repayment, the plaintiff executed a mortgage in favour of the 1st defendant securing his share in his family property and making himself liable for his uncle's debt. The transaction is challenged by the plaintiff on the ground that it is vitiated by undue influence. The short point to be decided in the case is: is it so vitiated? I may however point out that a mass of evidence has been adduced to show, or to rebut, that other invalidating grounds existed, namely, (1) that in the deed finally executed, the term that the amount is repayable on demand was fraudulently inserted, contrary to the original understanding that it was repayable only after two years; (2) that the 1st defendant falsely denied the existence of certain jewels and repudiated after the execution of the deed his promise to return them to the 2nd defendant. Not only was evidence directed to these points but much time was taken up on that account. But when the case reached the stage of final argument, the Counsel for the plaintiff and the 1st defendant adopted the view which I was disposed to take from the start and confined themselves to the bare question, the question decisive of the case—is the transaction vitiated by undue influence? I may state that I did not prevent evidence being adduc-

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ed on the other points as I felt that in the event of the case going further, the parties should have no ground of complaint on the score of any evidence having been shut out.

The following pedigree may be found useful in understanding the facts of the case:—

Damodardas d. 8-12-19

Govardhandas	Balakrishnadas d. 1914 m. Rukmanibai.
Subbaroyadas (minor)	Plaintiff Born 4-2-05.

The father of the plaintiff died in 1914 and the plaintiff thereafter lived at Madras with his maternal uncle, the 2nd defendant, whereas his mother resided also at Madras in the family house along with Govardhandas and his son. On the 30th of September, 1917, there was a partition of the family properties. The grandfather separated from the rest and certain properties were allotted in common to the other members of the family. At the partition the plaintiff who was an infant was represented by his mother and his maternal uncle, the 2nd defendant, who acted as his guardian. Immediately after the partition, a trust deed was executed constituting the plaintiff's grand-father and Purushothamdas trustees for managing the properties belonging to the plaintiff, his uncle and his uncle's son. These properties, of course, included those that fell to their share at the partition. Damordardas died in 1919 and on the 5th, January, 1921, a deed came into existence which appointed one Chinna Veerappa trustee in the place of Damodardas. Shortly afterwards Chinna Veerappa died and Purushothamdas remained and continued to be the sole trustee.

There were dealings between the 1st defendant and Purushothamdas, and in the course of such dealings, the latter became indebted to the 1st defendant in a large sum of money. It is unnecessary to go into the history of these dealings and it is sufficient to say that in August, 1925, it was found that Purushothamdas owed the 1st defendant a sum of Rs. 24,000 and that the position of the former was extremely precarious. I must add that Purushothamdas left Madras in 1923, and returned only about July 1925. During this period the evidence discloses that the dealings between the 1st defendant and Purushothamdas continued and it became more and more manifest that Purushothamdas was in difficulties. It is also import-

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ant to note that during his absence from Madras, the plaintiff went to live in the family house with his mother and his paternal uncle Govardhandas. After Purushothamdas returned, the plaintiff seems to have continued to live at his family residence but was frequently visiting the former. This was the state of things that prevailed on the 14th of August, 1925, when the suit mortgage deed was executed. On that date the plaintiff was 20 years of age and in the eye of the law an adult. It is common ground that the plaintiff was much attached to his maternal uncle. In fact, as I have shown, the boy practically lived as his ward, preferring his protection to that of his mother and his paternal uncle. The 1st defendant finding that Purushothamdas was not in a position to pay the large amount due to him, began to feel uneasy and brought pressure to bear on him for the repayment of his debt. A lawyer's notice was sent making a demand and it was evident that the 2nd defendant was in a state of bankruptcy. It is said that he had lands in the mofussil of some small value and that he imagined he was going to get at a future date a fabulous amount from some source. These points have not been pursued and the case was argued on the footing that Purushothamdas was on the date of the mortgage practically a bankrupt. He has in fact since been adjudicated an insolvent and the Official Assignee now represents his estate in the suit. The 1st defendant's demands having become persistent, a proposal came to be made which was to the effect that the plaintiff was to execute a mortgage in his favour charging the plaintiff's share in certain two houses with the debt and making that share security for its repayment. A scribe by name Rahiman Ali, a man suggested by the 1st defendant, was employed and a mortgage deed was prepared and executed. Though the plaintiff was the only individual affected by the mortgage deed, Purushothamdas also nominally joined in its execution. Its recitals make it perfectly clear (and there is no dispute on this point) that the debt was that of the 2nd defendant and that the plaintiff derived no personal advantage. I may notice that the deed says that a trifling amount in cash was paid to the plaintiff but the evidence has shown that this is utterly false and it is not now denied that the plaintiff derived no benefit whatever from the deed. In this case there has been a lot of hard swearing on every side and I am quite prepared to endorse a remark made by one of the counsel at the bar that a single case hardly ever presents a greater collection of liars than have figured at this trial.

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The curious result has been that none of the counsel has chosen to rely upon the evidence even of his own witnesses and with great propriety each of the counsel has taken his stand mainly on admitted or undisputed or indisputable facts. What, then, are those facts? Besides those that I have adverted to, the evidence also shows that the plaintiff was practically not possessed of any property other than his share in these two houses. They were valued by the 1st defendant himself at Rs. 20,000 and although Purushothamdas to suit his purposes estimates them as being worth very much more, it was not seriously suggested that the mortgage really left any margin. These two houses (the subject of the mortgage) were part of the trust estate legally in charge of the 2nd defendant. The next important point to note is, that about two weeks after the date of the mortgage, Purushothamdas made an application to this Court asking that he should be discharged from the office of trustee in respect of the estate of the plaintiff and his co-parceners (Ex. IX, dated 31st August, 1925). An order was made on that application by consent and it is alleged that the properties were thereafter formally handed to Goverdhandas (Plaintiff's paternal uncle) in whose favour Purshothamdas also passed a promissory note, dated the 8th September, 1925, for Rs. 4,000 being roughly the amount for which he was then accountable in respect of his management. That the condition of Purushothamdas was perilous also appears from the fact that at the instance of one Ponnandi Chetti, a criminal warrant had been issued for his arrest, first on the 17th of July, 1925, and that warrant having been returned unexecuted. a second one was issued on the 15th of August, 1925. Ponnandi Chetti had instituted criminal proceedings in respect of an alleged breach of trust by Purushothamdas to whom certain diamonds were said to have been entrusted in his capacity as broker. The dates of these warrants are very significant, the second of them having been issued just one day subsequent to the execution of the mortgage deed in question. It will be seen that so far I have been referring to facts which are either admitted or not denied. To the same category belong a few more facts. It is not disputed that neither the 1st defendant nor Purushothamdas directed the plaintiff to seek independent or disinterested advice. There is then the fact that the 1st defendant was aware that the plaintiff had his mother alive and that he had also a paternal uncle. Indeed the 1st defendant admits having seen the plaintiff's mother and

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having spoken to the plaintiff's paternal uncle before the date of the mortgage. It is not disputed that the 1st defendant was aware that the plaintiff was then only 20 years old, that Purushothamdas was his maternal uncle, that the properties mortgaged belonged to the plaintiff, that the debt was that of Purushothamdas with which the plaintiff had no concern and that under the deed the latter obtained no benefit whatsoever.

Having stated facts regarding which there is practically no dispute, I shall now turn to that part of the evidence in respect of which there is some conflict.

The plaintiff, who equally with Purushothamdas and Ratanchand (the son and the main witness of the 1st defendant) had shown himself a thorughly unreliable witness, has deposed that he was asked by them, at and before the mortgage, to keep the transaction secret from everyone including Govardhandas. Purushothamdas who previous to and at the trial was consistently supporting the plaintiff, has however given a different version and said that there was no secrecy imposed and in this respect he was supported by the 1st defendant. It is difficult to say as between these three who has been guilty of the least lying, but in this instance,, I am prepared to hold that the plaintiff was not expressly asked not to mention this matter to any third party.

The 1st defendant admits that he had known both the plaintiff and the 2nd defendant for some years previously and that he had frequently seen the nephew in his maternal uncle's house. The 1st defendant pretends that he had however no knowledge of the fact that the plaintiff was living for several years under the same roof as Purushothamdas, I have not been asked seriously to believe this, and I find that the 1st defendant knew of the fact that the plaintiff was living with Purushothamdas and as a member of his household. The 1st defendant also deposed that he was not aware of the existence of the criminal warrant. In this respect again I am not prepared to act on his evidence. Purushothamdas swears—and in this he is corroborated by several—that he was in hiding at Mambalam, a suburb of Madras, from the 6th August to the 18th August. 1925, and that during that time he was living with the 1st defendant at that place with a view to evade the criminal warrant which had been issued. I believe that this is substantially true and that the 1st defendant was aware at the time that a warrant was out for his debtor's arrest. There is another controversial point. Was the 1st defendant made aware of the exist-

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ence of the trust deed? The plaintiff, Rahiman Ali, the scribe, and Purushothamdas give one version which is to the effect that the trust deed was shown to the creditor. Ratanchand, the son of the 1st defendant, swears he was not shown the trust deed. I have unhesitatingly come to the conclusion that the evidence of Ratanchand must be rejected on this point. I reject his evidence mainly on the ground that it is so utterly improbable. In the first place, Ratanchand admitted in his evidence that several documents constituting the title deeds were put into his hands. He was asked in the witness box by his counsel to select the documents of which he was given inspection. The documents were either in English or Telugu, neither of which he professed to understand, but he went through the form of looking at each document and ultimately was able to say that certain documents alone were handed to him and not the others. Among those which he was not shown were found to be the deed of trust and the deed of appointment of a new trustee. By what method he was able to make this selection it is impossible to say. In passing I may note that according to him the partition deed was one of the documents handed to him which shows that Purushothamdas acted at the family division as the guardian of the plaintiff. Before Ratanchand was put into the box, I asked the 1st defendant's counsel what his case was in regard to this point and he made an express statement that the only documents, which were handed to his client before the transaction was entered into, were some papers in a suit including a decree. The evidence of Ratanchand is at direct variance with this statement, for according to him several other important deeds were placed in his hands. I am inclined to believe that the 1st defendant in his anxiety to make out that he was not at the time aware of the trust had recourse to this falsehood. There was no motive on the part either of the plaintiff or Purushothamdas to suppress mention of the trust deed. As a matter of fact we find that soon after the transaction, disputes arose between the 1st defendant on the one hand and the plaintiff and Purushothamdas on the other. Every possible contention was put forward on the latter's behalf to show that the mortgage deed was invalid and inoperative. It did not occur to them to say that plaintiff and Purushothamdas stood in fiduciary relations and the transaction was therefore invalid. It was long after the disputes began that this aspect of the case presented itself to the legal advisors of the plaintiff and there can be, therefore, no motive on the part of the plaintiff and Purushothamdas for

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withdrawing the trust deed from the documents handed to the 1st defendant. I am clearly of the opinion that the latter was on the date of the transaction aware of the peculiar relations between the uncle and the nephew by reason of the existence of, and arising out of, the trust deed.

There has been some little controversy as regards how far the plaintiff was competent to understand the nature of the transaction at the time he entered into it. He pretended that he did not know its nature when he executed the bond. After much fencing and prevaricating he greatly modified this answer and there is not the slightest doubt that he was aware, at any rate, generally, of the nature and the terms of the deed which he was called on to execute. The truth is, he had a bare knowledge of the facts, namely, that he was making himself liable for his uncle's debts and that he was giving his property as security. He was competent enough to understand this, but I do not think that he was in a position to resist the importunity of his uncle to whom he was attached. There is no evidence that he ever consulted Govardhandas and, although there is much doubt as to when the transaction first came to his knowledge, I cannot find on the evidence that he knew it at the time the mortgage deed was given. At any rate, on the material on record, there is nothing to show that the plaintiff sought the advice of any person, either of his paternal uncle or his mother or any stranger.

The last point that remains to be noticed is, did the 1st defendant take any part in persuading the plaintiff in entering into the suit transaction? It is not disputed that there was persuasion on the part of Purushothamdas. The 1st defendant suggested that he left the transaction to Purushothamdas to be put through and that he did not take an active part. It is difficult to say precisely what part the 1st defendant took, but I entertain no doubt that he was more than a mere silent participator. It is very probable that the 1st defendant, in his anxiety to get his debts secured, joined with Purushothamdas in inducing the plaintiff to execute the deed.. I am prepared to believe that very little persuasion on his part was necessary, but I cannot say that he kept himself scrupulously free from the taint. His evidence is demonstrably false on so many points that I am not disposed to believe him when he says that he took no part in the transaction.

I have now stated my conclusions on points regarding which there has been some dispute and from the welter of false

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testimony, which every one of the parties has asked me to reject, I have disentangled such facts as are reasonably free from doubt. The 1st defendant has not gone into the witness box, his son Ratanchand has proved himself an untrustworthy witness, the plaintiff, the scribe Rahiman Ali and Purushothamdas are unscrupulous liars and on every conceivable point as many versions have been given as there are witnesses in the case. I have therefore taken care to separate out of this mass, only such facts as cannot admit of serious doubt. What then is the bearing of these facts on the question that I have to decide? To answer this question, the law on the point must be reviewed.

I shall now refer to certain cases which have clearly laid down the principles applicable to a case of this kind. The first of them is *Rhodes* v. *Bate* (1). The plaintiff was a lady about 50 years old who was living with her brother-in-law Codrington. He became indebted to Bate in a large sum of money and for this debt the plaintiff along with Codington signed bonds in favour of Bate and further charged almost the whole of her estate with the payment of the debt. The plaintiff complained that the documents and securities were obtained by the undue influence exercised on her by Codrington as well as Bate, both of whom, she alleged, stood in confidential relations to her. I may note in passing that this case differs from the present one, in so far as the creditor, the 1st defendant, does not stand in any fiduciary relation to the plaintiff. But the case establishes certain propositions which have a close bearing on the case I have to decide.

Lord Justice Turner after examining the evidence found that at the date of some of the transactions complained against, Bate stood in confidential relations with the plaintiff and as the facts of the case brought it within the principles which the Lord Justice stated in his judgment, he set aside those transactions.

What then are the principles stated?

(1) Where confidential relations exist, those standing in such relations cannot entitle themselves to hold benefits unless they can show that the persons who have conferred the benefits had competent and independent advice. In this case, neither does the age nor the capacity of the person conferring the benefit affect the principle.

1. L R (1866) 1 Ch. Ap. Ca. 252.

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This is stated by the learned Lord Justice to be "a settled general principle of the Court".

(2) Age and capacity are considerations which may be of importance in cases where no confidential relation exists.

Knight Bruce, L. J., concurs in this judgment. In this case there is a distinct finding that the plaintiff was not of weak mind and was perfectly competent to understand what she did (p. 256). There is also a finding that the plaintiff signed the deeds in question freely and voluntarily and without pressure or soliciation on the part of the defendant, that the contents were fully explained to her and she clearly understood their nature and effect (p. 257). It is also noticeable that the judgment makes mention of the fact that Bate told the plaintiff that Codrington would not be in a position to repay the debt and that ultimately she would be obliged to repay it (p. 261). Bate told the plaintiff this and cautioned her but the learned Lord Justice says that Bate did not press the subject upon her as an independent and disinterested advisor would have done, nor did he recommend the plaintiff to employ an independent solicitor (p. 261).

The facts of this case serve to show with what strictness the principle of the law enunciated in the judgment is enforced.

Espey v. *Lake* (2) is an instructive case. The plaintiff was a young lady who had just come of age and joined in making with her step-father, Speakman, as his surety, a promissory note in favour of Lake to whom Speakman owed a sum of money. The plaintiff was living with her mother and step-father from infancy. She received no consideration for the note which was given for the debt of her step-father. The transaction was challenged by the plaintiff and it was set aside by Turner, V. C. It will be seen that in this case the relationship was not in the nature of a trust; nor was it strictly that of guardian and ward. The transaction was set aside on the ground that Speakman stood to the plaintiff in a relation which gave rise to confidence between the parties. The step-father stood in *loco parentis* to the plaintiff and that was considered sufficient. It is also to be noted that this is a case of influence arising by inference from the situation of the parties. It is not necessary to prove by direct evidence that any deception or fraud was practised. Speakman being in confidential position, it was incumbent upon him to affirmatively prove that he did not take advantage of the position of influence which subsisted

2. (1852) 10 Hare 260 : 68 E R 923.

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between the parties. He failed to do it and the plaintiff was entitled to succeed. So far as Lake was concerned, he had notice of the equities arising from the position of the parties and that was deemed sufficient as against him. There is a close resemblance between this and the present case. If it is shown that the parties stood in such a situation as to give rise to confidence between them and that the third party who derives the benefit was aware of the existence of this relation—if this is shown, the third party is not entitled to retain the security, unless he shows that the party conferring the benefit was a free agent and had independent and distinterested advice. It is not necessary for the party impeaching the transaction to prove that he was deceived by the person who put himself in *loco parentis* towards him; nor is it necessary for him to make out that the third party connived at any actual fraud. The doctrine is the result of the jealousy and solicitude with which Courts of Equity watch the interests of the weaker party where a special confidential or fiduciary relation is established. To sum up : (1) if there is a relation which gives rise to confidence between the parties and if the person in fiduciary position obtains an advantage—where this alone is established and nothing further, the Court gives relief to the party conferring the benefit, unless the other party shows that he did not avail himself of the confidence which subsisted between the parties. The burden is, therefore, upon him and, if he does not discharge the burden, the plaintiff succeeds. (2) When there is a third party involved, the position is not dissimilar. If it is shown that he was aware of the existence of such confidential or fiduciary relation, he is under the same disability as the party who occupied the position of confidence; that is to say, the Court gives relief to the plaintiff without demanding proof of fraud, or imposition, or any specific act of undue influence. It is enough that the third party was aware of the existence of the confidential relation and the Courts do not insist on proof that he was further aware of the actual exercise of undue influence.

These two propositions are well settled and both these principles are applicable to the facts of the present case.

In *Espey* v. *Lake* (2), the case which I have been discussing, the Vice Chancellor makes an observation which I find repeatedly occurs in the cases on the subject, viz., that the credittor, the third party, was not guilty of any moral fraud, nor had he a knowledge of the principles which guide a Court of Equity.

2. (1852) 10 Hare 260 : 68 E R 923.

Narayana Doss Balakrishna Doss v. Buchraj Chordia Sowcar.

in such cases. This does not any the less render the third party liable to surrender the benefit. This is a remark which one cannot disregard in dealing with a case of the kind before me.

Archer v. *Hudson* (3) is another case referred to by Mr. S. Doraiswami Aiyar for the plaintiff which is directly in point. The parties who stood in fiduciary relations were uncle and niece. The uncle overdrew his account at his bankers and the niece entered into a voluntary security for his debt. The Court found that the person who was representing the Bank in the transaction was well acquainted with the relative situation of these two parties. Lord Langdale, M. R., held (and it was subsequently affirmed by the Lord Chancellor) that, where there is a pecuniary transaction between a child and one in *loco parentis* towards her just after she comes of age and prior to what may be called a complete "emancipation" without any benefit moving to the child, the presumption is that an undue influence has been exercised to procure that liability on the part of the child. It must be shown, if the creditor is to succeed, that the child had such protection as would secure to her a free and unfettered judgment independent of any sort of control. In this case again, it will be observed that the undue influence was that which arose by inference from the situation of the parties. It will also be observed that the third party was merely aware of the existence of the confidential relation and that was held sufficient to disentitle him to retain the benefit.

Maitland v. *Irving* (4) is another case which applies these well-settled principles and I do not propose to state the facts of that case in great detail. That was also the case of a niece who had just come of age and the other party was her uncle who had previously been her guardian. There too the third party was a creditor to whom the uncle owed a debt for which the plaintiff. the niece, made herself liable. In that case also the creditor was aware of the peculiar confidential relations between the two parties and took the security without making any enquiry or taking any pains to ascertain whether the niece was a free agent who acted with the full knowledge of the consequences of her act. From these facts the Court firstly inferred undue influence and secondly held that the knowledge of the creditor was sufficient to bring the case within the principles I have stated.

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3. (1844) 7 Beav. 551 : 49 E R 1180.
4. (1846) 15 Sim. 437 : 60 E R 688.

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Berdoe v. *Dawson* (5), *Turnbull & Co.* v. *Duval* (6) and *Chaplin and Co., Ltd.* v. *Brammall* (7) are cases of the same kind and do not call for any special remarks.

I may here pause to re-state, at the risk of repetition the principle established by these cases. With the exception of *Rhodes* v. *Bate* (1) and *Turnbull & Co.* v. *Duval* (6) which are of a peculiar kind being open to the double objection of there being two persons in a position of special influence, one of whom was the creditor himself, these various cases illustrate and enforce the same point. In each of them, there was a third party present besides the individuals standing to each other in fiduciary relations and the third party was held affected not by reason of any active participation in, but by bare knowledge of, undue influence exercised in fact, or as is more frequently the case, and this is important, by the mere knowledge of the situation of the parties which in law gave rise to a presumption of undue influence.

Having regard to the facts of the present case I may with advantage refer to another aspect emphasised in some of the authorities to which I have referred. In *Espy* v. *Lake* (2), *Turnbull & Co.* v. *Duval* (6) and *Chaplin and Co., Ltd.* v. *Brammall* (7) the stranger creditor claimed immunity on the ground that he took no part in the transaction but left it entirely to the person in fiduciary position. This argument was in each of these cases expressly negatived. The 1st defendant in the present case has taken up a somewhat similar position, but that cannot avail him.

Mr. Grant for the 1st defendant has cited two cases. The first of them, *Bainbrigge* v. *Browne* (8), does not support him as it states (and very clearly) the law in just the same terms as the other cases which have been already referred to. On the evidence it was found in that case that the defendants had no notice of the circumstances giving rise to the equity. Fry, J., in his judgment says:

"I think that the defendants were entitled to come to the conclusion that the children were resident away from their father, not under his control, fully emancipated from him, assisted by the advice of their friends, and by the advice of a solicitor who was bound to do his duty to them."

1. L R (1866) 1 Ch. Ap. Ca. 252.
2. (1852) 10 Hare. 260 : 68 E R 923.
5. (1865) 34 Beav. 603 : 55 E R 768.
6. L R (1902) A C 429. 7. L R (1908) 1 K B 233 (C A).
8. L R (1881) 18 Ch. D 188.

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This passage shows that the case, far from supporting Mr. Grant, is really against his contention.

The second case relied on by Mr. Grant is *Thornber* v. *Sheard* (9) which is said to decide the other way (of which I am doubtful), but if it does, it is against the clear weight of authority and I cannot follow it. There is an Indian case *Raj Coomar Roy* v. *Alfuzuddin Ahmed* (10), a decision of a single Judge, which purporting to follow *Thornber* v. *Sheard* (9) states the law thus:

"But I do not find any authority for holding that a third party, who stands in no confidential relation to the grantor, is bound in the first instance to show that no undue influence was used."

I must with the greatest respect dissent from this observation and hold that it does not correctly represent the law on the point.

This being the legal position, I shall now examine whether the facts I have stated bring the present case within the principles laid down in these various decisions. In discussing the facts I have carefully separated those that are admitted or not denied from those that are disputed. It seems to me that I cannot support this transaction even if I confine myself only to indisputable and undisputed facts. Supposing this was a transaction between the plaintiff and the 2nd defendant and there was no third party in the case, could this be supported? That they stood in confidential or fiduciary relations is well established by authority. It is not special relations arising from certain situations only, such as parent and child, or, guardian and ward, that are jealously watched by the Court; on the other hand, the principle on which equity gives relief is extended and applied to all the variety of relations in which dominion may be exercised by one person over another. (White and Tudor's Leading Cases, 8th Edition, Vol. I, p. 282) Similarly, the Court does not fetter its discretion by a fictitious regard to the age of the person aggrieved; for the fact that the child has attained the bare age of majority signifies little and complete emancipation is insisted on. The law looks at the substance of the thing and it is essential that the relationship should have ceased not merely in name but in fact. The plaintiff lived for several years with, and under the protection of, the 2nd defendant who besides was his maternal uncle and acted as his guardian at the family partition. The plaintiff

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9. (1850) 12 Beav. 589 : 50 E R 1180.
10. (1881) 8 C L R 419.

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again was not fully removed from the influence of the 2nd defendant, and it cannot be said that there was complete emancipation. These facts alone would give rise to a position of great confidence between the parties. If the case had been merely one between the plaintiff and the 2nd defendant, it would have been the latter's clear duty to see that the relations were completely dissolved and that the donor had independant and disinterested advice.

Lindley, L. J., in *Allcard* v. *Skinner* (11) classifies cases in which equity invalidates gifts into two groups. The second group, with which we are concerned, consists of cases where the Courts infer undue influence from the mere position of the parties and throws upon the donee the burden of proving that he has not abused his position and that the donor had independent advice and was removed from the donee's influence. In such cases, the transaction is disallowed not on account of any positive fraud but because it is contrary to the general policy of the law. (White and Tudor's Leading Cases, 8th Edition, Vol. I, pages 278 and 279).

To this group belongs the present case. No evidence has been given of the kind required and it therefore follows that if the transaction was between the plaintiff and the 2nd defendant, a Court of Equity would not uphold it.

How does the presence of the third party then affect this case? I have already said that when a stranger takes the gift tainted with the undue influence of the person in fiduciary position, with notice of the circumstances giving rise to the equity, the Court will compel him to give up the benefit. Now applying this rule and again confining myself to admitted facts, I am of the opinion that the 1st defendant is bound to surrender the benefit. —He was aware of the antecedent confidential relations, he was also aware that they were not completely dissolved and that the parties are not met on equal terms; he was further aware that the plaintiff was not in a position to exercise free, unfettered and deliberate judgment and that he was not directed to seek disinterested or independent advice. On these facts alone, the plaintiff can in my opinion, succeed.

But whatever my own view may be, it is unnecessary to rest my judgment on admitted facts alone. On the date of the transaction the plaintiff and the 2nd defendant occupied the position of trustee and *cestui que trust* and I have found that

11 L R (1887) 36 Ch. D 145.

the 1st defendant was aware of the existence of this special relationship. I have further found that the plaintiff who was not a free agent equal to protecting himself was persuaded by Purushothamdas to enter into this transaction and that he was so drawn into this inequitable and unconscientious bargain also in some measure under the influence of the 1st defendant himself. In any case, being aware that there was importunity by Purushothamdas which the plaintiff was unable to resist, he took full advantage of it. I have therefore come to the conclusion that the transaction cannot be upheld and I set it aside.

There remains only one small matter which I must notice. The mortgage deed was attacked by the plaintiff *inter alia* upon the ground that when he executed it none of the attesting witnesses was present. This case partially broke down when his chief witness Rahiman Ali was obliged to modify his previous answer and say that the plaintiff had admitted execution before the attesting witnesses signed their names. This ground was not seriously relied on and I do not think I need pursue the point.

As regards costs, I have an observation to make. The conduct of the 1st defendant in entering into the transaction was not dishonest or morally wrong, and it is on account of the equitable principles which the Court applies that the plaintiff succeeds. If, therefore, the 1st defendant had been content to state the truth and leave the law to take its course, I should have been inclined to deprive the plaintiff of his costs in view of the fact that he has given false evidence. But as the 1st defendant himself has adduced much untrue evidence I do not think there is any reason for departing from the ordinary rule and I direct that he shall pay the plaintiff his costs of the suit.

I fix the remuneration of the short-hand clerks at Rs. 300. I direct that the plaintiff and the 1st defendant shall each pay for the transcript of the evidence and copies supplied Rs. 150. If either of them pays more than his share in the first instance, he will be entitled to recover the excess from the other.

N. S. *Suit decreed.*

[PRIVY COUNCIL.]

[On appeal from the High Court of Judicature at Madras.]

PRESENT :—LORD ATKINSON, LORD SHAW AND LORD DARLING.

Sri Kanchumarthi Venkata Seetharama Chandra Row ... *Appellant**

v.

Kanchumarthi Raju *alias* Venkata Krishna Row and others ... *Respondents.*

P. C.

Kanchumarthi Venkata Seetharama Chandra Row *v.* Kanchumarthi Raju.

Hindu Law—Adoption—Authority to adopt—Presumption in favour of—Onus of proving absence of—Suit to set aside adoption by reversioner—Long delay in instituting—Adoption admitted—Transactions of open life and conduct consistent only with recognition of validity of adoption by plaintiff himself—Effect.

The reversionary heir of a deceased Hindu sued to set aside an adoption made to him by his second widow about 42 years before the date of suit. In the Courts below the plaintiff denied the adoption itself; but that point was found against him, and the only question raised by him in the appeal to the Privy Council was that the widow had not the authority of her husband to make the adoption.

The adopted son was, from the moment of his adoption, transferred from his natural home to his adopted home and had lived there all his life as a member of that household. On the last male owner's death, the local authorities made the ordinary enquiries as to the necessary entries on the register consequent upon such death, and the widow, adoptive mother, was entered as guardian of the minor and adopted son. There were litigations of various characters during the course of the long term of years which elapsed after the adoption, and the plaintiff acted along with the adopted son, acknowledging, in the course of the proceedings, his right. The plaintiff did not question the authority to adopt during the widow's life, which extended for 30 years beyond that of her husband.

Held, that, under the circumstances of the case, the burden, resting, altogether apart from the law of limitation, upon any litigant who challenged the authority of an admitted adoption, was indeed of the heaviest character.

W. H. Upjolm and *J. M. Parikh* for appellant.

L. De Gruyther and *K. V. L. Narasimham* for respondents.

The Judgment of their Lordships was delivered by

Lord Shaw.

LORD SHAW.—This is an appeal from a decree and judgment of the High Court of Judicature at Madras, dated the 18th October, 1922, reversing a decree and judgment of the Court of the Additional Subordinate Judge of Rajahmundry, dated the 29th April, 1921.

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* P. C. Appeal No. 92 of 1924. 23rd June, 1925.

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The appeal raises a question of fact.

One Subbayya died on the 1st November, 1878, leaving two widows and without natural issue. His first widow had been for some time separated from him. His second widow resided with him. Some days after his death she adopted the first respondent, a young boy, as son to her husband Subbayya. The boy was accordingly handed over by his natural father, whose household he left, and he lived and grew to manhood as a member of the household of Subbayya's widow, his adoptive mother. The lapse of time between the adoption and the date of suit was about 42 years. The challenge of the adoption is made by the plaintiff, not only of course after the death of Subbayya, but after the death of his senior widow, who died in 1895, and after the death of the junior widow, the adoptive mother, who survived as long as 1907.

It was not contended before the Court that no adoption was made. It was an adoption perfectly suitable in all respects; it was acted on for the long period of years mentioned; but the sole argument on the appeal was a challenge of any authority having been given by Subbayya to his widow to make the adoption. The case accordingly is restricted even on fact to this question.

Were it not that the plaintiff has obtained, on this part of the case, the support of a judgment of the Subordinate Judge, the case and the appeal might be justly characterised as not only unfounded but audacious.

It is fair to the Subordinate Judge to give his conclusion on the issue of fact in the case. He puts it thus:—

"*Sixth issue*—The point for decision is whether Ammayamma adopted 1st Defendant as the son of Subbayya, and if so whether she was given by him the required authority to adopt; and, giving my very best and anxious consideration to the recorded evidence, probabilities of the case and the decisions cited on both sides, paying due attention to the facts that the adoption of 1st Defendant was celebrated about forty-two years ago and that he was, all through and till the filing of the suit, being treated as the adopted son of Subbayya and a member of the Kanchumarthi family by all its members, inclusive of the plaintiff, by a wide circle of relatives and friends, by the tenantry of the Kalavlapalli estate, by the Government and its officials and by the outside public; and bearing in mind the presumptions that can be properly and legitimately made in favour of his adoption from the long time that had elapsed (about 42 years) after the adoption and from the acquiescence therein all through this very long period of those inside and outside the family, as shown by some of the decisions cited on either side, I come to the conclu-

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sion that Ammayamma did in fact adopt 1st Defendant as the son of her deceased husband Subbayya on a day within a month of the death of Subbayya."

Up to this point this is an admirable and correct summary. But the learned Judge after this states his conclusion:—

"That she had not the authority of her husband to make the adoption and that therefore it is not a valid adoption"

The singularity of this result is obvious when it is considered that the four principal witnesses who proved the adoption also proved the authority to adopt. They knew both the husband and wife. They saw the husband, and heard him, in his last illness, give the authority to the wife a few days before his death, and a few days after his death they saw the ceremony of the adoption. The learned Subordinate Judge believes them on the latter point, but, for some reason, does not give effect to their testimony on the former point. It is not as if there was anything singular in the giving of such an authority. The adoption was itself in accord with what a pious Hindu would wish to be done so that someone would remain after his death to perform the sacrificial and other ceremonial and pious duties resting upon a child.

So far as the widow was concerned, her conduct had no element of usurpation in it, but simply the element of carrying out her husband's dying wish.

So far as the adopted son was concerned, he was transferred from his natural home to his adopted home and he has lived there all his life as a member of that household.

So far as the plaintiff is concerned, he denied the adoption in this suit, a thing which now stands amply proved and admitted. He did not question the authority to adopt during the late widow's life, which extended for 30 years beyond that of her husband, and his suggestion now is that the idea of the young man's adoption being unauthorised was put into his head as a result of a conversation with someone who is not produced as a witness.

The record, however, does not stop there, because, the local authorities, having made the ordinary enquiries as to the necessary entries upon the register consequent upon Subbayya's death, made the enquiries and took the depositions, and the second wife was entered as guardian of the minor and adopted son—that is to say, the first respondent. There were litigations of various characters during the course of this long term of years and the plaintiff acted along with the adopted son, acknowledging, in the course of the proceedings, his right.

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It is at the end of this long chapter that the challenge is made. Their Lordships have considered all the documents produced and read all the evidence. They cannot understand why it should not be held to be quite conclusive, not only of the fact of adoption, but of the authority to adopt. It stands to reason that after such a long term of years, and the variety of transactions of open life and conduct, upon one footing, and one footing alone—namely, that the adoption was recognised as a valid act—the burden, resting, altogether apart from the law of limitation, upon any litigant who challenges the authority of an admitted adoption, is indeed of the heaviest order. In their Lordships' view it is not, however, necessary to invoke any doctrine of presumption in this case. The facts, the evidence, and the documents are all one way—namely, in the direction of establishing that the view taken by the learned Judges of the High Court is in result sound.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be refused, with costs.

Solicitor for appellant : *H. Polak.*

Solicitor for respondents : *D. Grant.*

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WILLIAM PHILLIPS, *Kt., Officiating Chief Justice*, AND MR. JUSTICE ANANTHAKRISHNA AIYAR.

Nagarathnammal and others ... *Appellants**

v.

Chinnu Sah and others ... *Respondents.*

Nagarathnammal v. Chinnu Sah.

Hindu Law—Illegitimate son—Inheritance to father—Right of—Collaterals in existence—Effect—Illegitimate daughter—Maintenance—Right of.

An illegitimate son is not entitled to any share in the family property of his deceased father when there are collaterals in the family.

Gopalasami Chetti v. *Arunachellam Chetti*, (1903) I L R 27 Mad. 32, approved and followed.

Illegitimate daughters are not entitled to maintenance from their father's family.

Appeal from the judgment of the Hon'ble Mr. Justice Srinivasa Aiyangar, dated the 26th day of July, 1926, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 319 of 1925.

K. Narasimha Aiyar and *E. Doraiswami Aiyar* for appellants.

K. G. Ramaswami Aiyangar for respondents.

*O. S. A. No. 93 of 1926. 2nd August, 1927

Nagarathnammal v. Chinna Sah.

The Court delivered the following

JUDGMENT :—The plaintiffs have brought this suit to recover a share in the family property of themselves and the defendants. Plaintiffs 2 and 3 are the illegitimate sons of the deceased brother of the 3rd defendant; defendants 1 and 2 are sons of the deceased and the 4th defendant is the son of the 3rd defendant. The learned trial Judge has held that, sitting as a single Judge, he is bound by the decision in *Gopalasami Chetti* v. *Arunachellam Chetty* (1) and has held that the illegitimate sons, plaintiffs 2 and 3, are not entitled to any share in the family property of their deceased father as there are collaterals in existence. This point was expressly determined in *Gopalasami Chetti* v. *Arunachellam Chetty*(1), but it is now sought to be argued that that decision is wrong. Reliance is placed chiefly on a decision of the Privy Council reported in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing* (2). This case in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing* (2) was considered in *Ramalinga Muppan* v. *Pavadai Goundan* (3), and it was there held that it did not affect the law as laid down in this presidency. Similarly in *Gopalaswami Chetti* v. *Arunachellam Chetty* (1), the case in *Ramalinga Muppan* v. *Pavadi Goundan* (3), more particularly that portion of it referring to the Privy Council decision, was considered, and it was held that an illegitimate son was not entitled to a share in the family property when there were collaterals in the family. The learned vakil for the appellants has been unable to refer us to any case in which the correctness of *Gopalasami Chetti* v. *Arunachellam Chetty* (1) has been impeached, and that case only carries a little further the decisions of this Court beginning with *Krishnayyan* v. *Muttusami* (4). That current of decisions has continued for the last 40 years and there appears to be no case in which the principle has been questioned. With all respects, we entirely agree with the decision in *Gopalasami Chetti* v. *Arunachellam Chetti* (1) and, as nothing has been urged before us to show that it is in any way wrong, we are prepared to follow it. The appeal accordingly fails.

A Memorandum of objections has been filed by the respondents objecting to the grant of maintenance to plaintiffs 4

1. (1903) I L R 27 M 32.
2. (1890) L R 17 I A 128 . I L R 18 C 151 (P C).
3. (1901) I L R 25 M 519 · 11 M L J 399.
4. (1883) I L R 7 M 407.

Naga-rathnammal v. Chinna Sah.

and 5, the illegitimate daughters of Chinnasami Sah. The question of whether they are entitled to any maintenance has not been discussed in the trial Court, but the learned Judge has remarked :

"As regards them (namely plaintiffs 4 and 5), it is not admitted by the defendants that they would be entitled to maintenance, but still, in order to avoid any further litigation or question, the defendants' counsel is willing that I should fix a reasonable rate of maintenance for them also".

It is, therefore, contended for the appellants that the decree for maintenance in their favour is a consent decree and cannot be altered, but we are assured by the respondents' counsel that this agreement was, as stated in the judgment, "in order to avoid any further litigation" and that it was understood that the agreement was subject to the plaintiffs not appealing against the decree for maintenance. This is consistent with the language of the judgment and we must accept counsel's submission that this is the correct interpretation of the learned Judge's order. It has been held very recently in this court in *Vellaiyappa Chetty* v. *Natarajan* (5) that illegitimate daughters are not entitled to maintenance from their father's family. The provision therefore for their maintenance and for their marriage expenses must be omitted. In this respect the decree must be modified.

The appeal is dismissed with costs. No order as to costs in the Memorandum of Objections.

A. S. V. *Appeal dismissed and Memo. allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN AND MR. JUSTICE ANANTAKRISKNA AIYAR.

Balam Nookamma and another...*Appellants** (*Defts.* 1 *and* 5)

v.

Sadireddi Dharmayya and others ... *Respondents* (*Plaintiffs*).

Nookamma v. Dharmayya.

Evidence Act, S 92—Mortgage simple—Repayment of amount of, out of usufruct of mortgaged property—Oral agreement for—Proof of—Permissibility

An oral arrangement providing for repayment of a mortgage debt from the usufruct of the mortgaged property may be proved Such an arrangement does not amount to a lease, nor does it constitute an usu-

*S. A. No. 1366 of 1924 8th August, 1927.

5. (1926) I L R 50 M 340 : 52 M L J 229.

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fructuary mortgage. It is only a means of discharging the debt by putting the simple mortgagee in possession of the mortgaged property.

Second Appeal against the decree of the District Court of Vizagapatam in A. S. No. 359 of 1923, preferred against the decree of the Court of the District Munsif, Yellamanchili, in O. S. No. 282 of1922.

Md. Ibrahim and *G. Ramakrishna Aiyar* for appellants.

P. Somasundaram for respondents.

The Court delivered the following

JUDGMENT :—There are no grounds for interfering in Second Appeal with the findings of fact of the lower appellate court. The only point for consideration is as to the admissibility of the oral arrangement providing for repayment of the mortgage debt from the usufruct of the land. The contention that this amounted to a lease is clearly untenable, nor did it constitute an usufructuary mortgage, but only a means of discharging the debt by putting the simple mortgagee in possession of the property. [See *Ram Baksh* v. *Durjan* (1) and *Kamala Sahai* v. *Babu Nandan Mian* (2).] As such even an oral agreement may be proved.

We dismiss the Second Appeal with costs.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE RAMESAM.

Maddirala Jagannadham and another ... *Appellants** (*Defts.* 1 and 2.)

v.

Maddirala Venkata Subba Rao and others. ... *Respondents* (*Plaintiff and Defts.* 3 *to* 9, 12 *to* 19 *and* 22 *to* 29).

Jagannadham v. Venkata Subba Rao.

Civil Procedure Code, S. 11—*Litigating under the same title—Decision on plea of* jus tertii—Jus tertii *relied on in a later suit by the third person —Decision in the former suit if binding—Heir of the third person raising the plea in the later suit happening to be the defendant who raised the plea in the former suit—If makes any difference—Pedigree table—Proof of—Name of common ancestor not proved—Effect.*

The decision on a plea of *jus tertii* raised by the defendant in a suit is not a decision between the parties litigating under the same title when the

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*Appeal No. 375 of 1923. 18th March 1927.

1. (1887) I L R 9 A 392.
2. (1909) 11 C L J 39.

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jus tertii is put forward and actually relied on in a later case by the third person. It is immaterial that the heir of the third person who puts forward the *jus tertii* in the later case happens to be the very person who, as defendant, raised the title of his father as *jus tertii* in the former case.

It is not the law that, without the name of the common ancestor, a pedigree cannot be proved. The fact that a witness is unable to give the name of the common ancestor may be a cogent reason why he should be disbelieved; but, if it is otherwise clear that the alleged relationship of descent from two brothers is proved, the mere fact that the name of the common ancestor is not known is not a reason for holding that the relationship is not proved at all.

Kedarnath Doss v. *Protab Chunder Doss,* (1881) I. L. R. 6 C. 626, explained.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in Original Suit No. 90 of 1921.

B. Somayya for appellants.

Ch. Raghava Rao, A. Sundaram Aiyar, A. K. Ramachandra Ayyar and *E. Krishnamurthi* for Respondents.

The Court delivered the following

JUDGMENT :—*Ramesam, J.*—This appeal arises out of a suit by a reversioner to recover certain properties of a deceased person named Punnayya. Defendants 1 and 2 claim to be nearer heirs than the plaintiff. The plaintiff is the son of one Pakeerayya. His present suit is based on the ground that his father who survived the deceased was a nearer heir than the defendants and after the property vested in Pakeerayya he succeeded to his right. The learned Subordinate Judge found in favour of the plaintiff and gave a decree. The defendants appeal. Ramesam, J.

The first question argued in appeal is the question of *res judicata.* Immediately after the death of Punnayya there was a suit by the present defendants to recover the property in which the defendant was the present plaintiff. But the father of the present plaintiff was not a party to the suit. In that suit the defendant, that is, the present plaintiff pleaded his own title and did not rely upon any title of Pakeerayya because he could not, as Pakeerayya was then living. He merely put forward the title of Pakeerayya as *jus tertii.* As the plea was found against him, the plaintiffs in that case were given a decree. On appeal an attempt to file some documents and prove the title of Pakeerayya was disallowed. So far as the former litigation is concerned, all we have is that the defendant in the case raised a plea of *jus tertii.* It cannot be said for the purpose of S. 11 that the decision on a plea of *jus tertii* is a decision between the parties litigating under the same title when the *jus tertii* is put forward and actually relied on in a later case by the

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third person. All that can be said is that, in the former suit, it was raised as a defence. It cannot be said that the defendant was actually relying upon that title or litigating under it. Now the present plaintiff who claims as the heir of Pakeerayya litigates under it. Mr. Somayya who appears for the appellants concedes that the judgment in the former suit does not bind Pakeerayya himself, or his assignees, or his heirs. It is merely an accident in the case that the heir of Pakeerayya happens to be the very person who put forward the plea of *jus tertii*. That is only an accidental circumstance. It might happen to be a different person. It is therefore clear that there is no *res judicata* by reason of the judgment in the former litigation.

The second point argued is the question on the merits, namely, as to who is the nearer heir.

On the 2nd question argued as to who is the nearer heir, his Lordship after discussing the evidence proceeded as follows.

The result is that the plaintiff's case is made out and the decree of the lower court is right.

One question of law was raised by the learned vakil for the appellants. He refers to *Kedarnath Doss* v. *Protab Chunder Doss* (1) and says that the name of the commen ancestor is not proved. On the face of Ex. A it is true that we do not know the name of the common ancestor and we start with three cousins as ancecstors. It is said that without the name of the common ancestor a pedigree cannot be proved. In *Kedarnath Doss* v. *Protab Chunder Doss* (1), Sir Richard Garth, C. J., says:

"I believe that the rule of evidence there in cases like the present is correctly laid down in the last edition of Roscoe's *Nisi Prius* Evidence, page 1010, that where the plaintiff claims as a collateral heir, he is bound to allege and prove his title through the common ancesfor in all its stages; and one most important stage is of course the common ancestor himself,"

and the other Judge, Pontifex, J., does not say anything on this matter. He simply says:

"The plaint ought to have stated the descent from a common ancestor, and the evidence ought to have supported such statement."

But even the Chief Justice's judgment merely says that the allegation in the evidence of a person claiming as heir must show all the stages of a relationship from the common ancestor. To this proposition nobody objects. When a person claims to be a '*gnati*' of the 4th or 5th degree, it is not sufficient if all that appears in the case is that he may be a cousin of the 10th or 12th degree. What he claims must be alleged and proved.

1. (1881) I L R 6 C 626.

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It does not mean that if the name of the common ancestor is not known, it must be held that the relationship is not proved. It does not mean that if two people have been proved to be brothers, their descendants are not related to one another merely because the name of the father of the two brothers is not known. No doubt, if a witness comes and swears that he knows the names of the two brothers, but he is not able to give the name of their father, it may be a circumstance to be taken into consideration in deciding whether the witness should be believed or not. The fact that a witness is unable to give the name of the common ancestor may be a cogent reason why he should be disbelieved. But if we are otherwise clear that two people are grandsons of brothers, the mere fact that the name of the common ancestor is not known cannot be made a reason for holding that the relationship is not proved at all. There can be no such legal proposition. We do not think that the learned Chief Justice meant to say any such thing or lay down any such proposition. Anyhow the authority relied on by the Chief Justice does not support this proposition. In the 18th Edition of Roscoe's *Nisi Prius* Evidence, published in 1907, the passage is at page 1038 and runs thus:

"If the plaintiff claims as collateral heir, he must prove the descent of himself and the person last seized from a common ancestor; or at least from two brothers or sisters [*Roe d Thorne* v. *Lord* (2).]"

This passage merely shows that there must be at least two brothers or sisters. Looking at the case itself, which is reported in *Roe on the demise of Thorne* v. *Lord and Others* (2), all that we have got is this:

"The court took time to consider till this present term, when not being able to agree in opinion concerning the necessity that a person claiming to be heir shall state in evidence a pedigree, either proving the deceased and the claimant to be descended from some common ancestor, or at least from two brothers, or sisters, (which was allowed to be an immediate descent), or whether vague evidence of heirship, without such deduction, is proper to be left to a jury... ...."

The contrast is between definite evidence of common ancestry or brothers' ancestry as against vague evidence of common ancestry. Of course vague evidence will not prove definite pedigree or descent. Definite descent from brothers is certainly common ancestry. There can be no legal proposition that, because the name of the common ancestor is not known, the relationship cannot be held to be proved. *Kedarnath Doss* v. *Protab Chunder Doss* (1) cannot be regarded as an authority

1. (1881) I L R 6 C 626. 2. (1776) 2 Bl. W. 1099 : 96 E. R. 649.

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for such a proposition, as is sometimes supposed. In this case there is a clear statement by the defendants' ancestors that Madiraju, Narayanappa and Lingaraju were grandsons of brothers. At that time there was no motive for making an inaccurate statement and the pedigree was not in dispute.

Acting on Ex. A-1, I accept the conclusion of the learned Subordinate Judge and dismiss this appeal with costs.

Kumaraswami Sastri, J.

Kumaraswami Sastri, J. :—I entirely agree.

N. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR KUMARASWAMI SASTRI AND MR. JUSTICE RAMESAM.

Sannidhiraju Subbarayadu and others ... *Appellants** (*Plaintiff's L. Rs.*).

v.

The Secretary of State for India in Council represented by the Collector of Godavari ... *Respondent* (*Defendant*).

Subbarayadu v. The Secretary of State for India.

Madras Irrigation Cess Act (*VII of* 1865), *S.* 1—*River belonging to Government—Navigable river—Navigability throughout the year, if necessary—River navigable for big boats for some months only in the year and for the rest navigable for fishing craft only—If can be said to be navigable throughout the year—River not wholly belonging to Government—Rights of riparian owner to draw water from—Levy of water-cess—Legality—Riparian rights—Nature and measure of.*

Navigability throughout the year is necessary to make a river navigable for the application of the rule that a river which is tidal and navigable belongs to Government.

The Secretary of State v. *Venkatanarasimha Naidu*, 1920 M W N 209, followed.

Where a river is navigable for big boats for about six or seven months only in the year but for the rest of the year it is navigable only for small fishing craft, and the evidence does not show that there is any trade in the fish and that fish from the river are exported to other places along the waterway, the river cannot be said to be navigable throughout the year.

Where a river or stream does not *wholly* belong to the Government, but, on the other hand, partly belongs to the riparian owner or does not belong to the Government at all, the riparian owner is entitled to draw water from it and, so long as he does not exceed his rights as a riparian owner, he is not liable to water-cess. Whether the right of the riparian owner is a natural right or a prescriptive right does not make any difference, and no distinction can be made between the effect of a grant on the measure of irrigation rights granted, whether the enjoyment at the time of the grant was by an easement or as a riparian owner with natural or prescriptive rights.

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*S. A. No. 1216 of 1924, 19th April, 1927.

Subbarayadu v. The Secretary of State for India.

Lakshminarasu Avadhanulu v *Secretary of State for India*, (1917) 34 M L J 223, and *The Secretary of State for India in Council* v. *The Maharaja of Bobbili*, (1919) L R 46 I A 302 : I L R 43 M 529 : 37 M L J 724 (P C), reffered to.

The effect of the decisions of the Privy Council in *Prasad Rao* v. *The Secretary of State for India*, (1917) L R 44 I A 166 · I L R 40 M 886 : 33 M L J 144 (P C), and *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India*, (1927) I L R 40 M 909 (P C), is not only to reverse the decisions in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India*, (1910) I L R 34 M 295 : 20 M L J 828 and *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi*, (1910) I L R 34 M 366, from which they arose in appeal, but also to reverse the decision of the majority in *The Secretary of State* v. *Janakiramayya*, (1912) I L R 37 M 322 : 24 M L J 365.

A riparian right is a natural right and is not acquired by immemorial user. It exists by law. It may be lost by the adverse enjoyment of another but it has not got to be enjoyed to be kept up. Whatever the enjoyment at the date of the grant may be, the measure of the right that passes is determined only by the configuration and the width of the river or stream.

Second appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. No. 104 of 1923 (A. S. No. 7 of 1923, on the file of the District Court, Godavari) preferred against the decree of the Court of the District Munsif of Amalapur in O. S. No. 833 of 1918.

N. Rama Rao and *P. Panini Rao* for appellants.

The Government Pleader for respondent.

The judgment of the Court was delivered by

Ramesam, J.

Ramesam, J. :—This second appeal arises out of a suit to recover from the defendant who is the Secretary of State for India in Council Rs. 8-13-2 being the water tax collected from the plaintiff by the defendant's officers and paid under protest and now alleged by the plaintiff to be illegally collected. The plaintiff is the *pujari* of a certain temple which owns a *darmila inam*, 12 acres and odd in extent. The inam was included in the assets of the zamindari of Guttenadivi at the time of the permanent settlement and was granted to the temple subsequent to it. Hence the word *'darmila'* inam (that is, subsequent inam), as opposed to inams granted prior to the settlement and excluded from the assets of a permanently settled estate and afterwards enfranchised by the inam rules in 1861 to 1864. Thus, the suit land is not an enfranchised inam and is part of the zamindari lands of Guttenadivi. The zamindari of Guttenadivi is a small zamindari paying a peishcush of Rs. 651 in Amalapur taluk (vide Maclean's Manual, Glossary, Vol. III

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under Amalapuram). The river Godavari is cross bunded by an ancicut below the town of Rajahmundry at the village of Dowleshwaram and below it splits up into two branches forming the Godavari delta. The northern branch is known as the Gautami branch and the Southern is known as the Vasistha branch. Between the two branches are the taluks of Amalapur and Razole and the zamindari of Guttenadivi is in the former taluk. The Gautami branch in the course of its progress towards the sea which it joins near Koringa splits up into innumerable branches which separate and join again forming islands; so that, it is some times difficult to say which is the main stream of the Godavari. The suit lands abut on a branch known as the Addarapu Kalva or Chilapa Kalva. The plaintiff alleged that on both sides of the branch are Guttenadivi lands but the courts below have found this against the plaintiff. They found that while on the one side there are Guttendivi lands, there are on the other side the Government lands of the Yedurlanka village. The plaintiff-appellant has questioned the correctness of this finding. For the present, the case will be discussed on the footing that the finding is correct. Both the lower courts dismissed the suit. The District Munsif found (vide paragraph 48 of the judgment) that the Government as owner of one of the bunds is also the owner of the northern half of the bed of the stream. He, therefore, held that the Government is entitled to levy water cess. On appeal the Subordinate Judge held that the stream was navigable and, therefore, belongs to Government. With reference to a contention that the plaintiff is entitled to exercise rights of a riparion owner free of water cess both the lower courts observed that long user has not been made out in the suit. The plaintiff files this second appeal.

Before us in second appeal two points have been elaborately argued. First, whether the stream is a navigable stream at the place where the suit lands abut on it, and secondly, in any event, that the plaintiff is entitled to the exercise of riparian rights free of water cess. On the first question, whether the river is navigable, the District Munsif recorded his finding thus (Paragraph 48 of the judgment):

"One of the branches of the Godavari bifurcates into Virudhagantami and Uppaganti Kalva each a mile wide; that Addarapu Kalva takes off from Uppaganti Kalva; that it is four or five miles long, that on one side of it at the point where plaintiff takes out his water there are Government lands and on the other Zamindari lands; that it is navigable in the ordinary sense of the term for big boats for about 6 or 7 months and only for fish-

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ing boats later to a distance of 20 yards in the remaining period of the year. It is admittedly subject to tidal action. As owner of one of the bunds half of the stream belongs to Government On this ground, I find that Government is entitled to levy water cess."

It is clear that the District Munsif thought that the river cannot be regarded as a navigable river, for if it could be regarded as navigable, the Government would have been the owner of the whole of the bed, but he held that the Government owned half of the stream. Earlier in paragraph 35, he observed:

"The water is fresh only for four months in the year and that it is brackish during the remaining 8 months, that fairly big boats pass over it from July to January and, thereafter, only small *navas* and that Chilapa Kalva is navigable for six months for fairly big boats"

The Subordinate Judge said :

"The learned District Munsif having fully examined the evidence came to the conclusion that the stream is navigable for big boats for about 6 or 7 months in the year for boats of a load of 15 tons and for the rest of the year for small fishing craft. In this finding of fact also I wholly concur, and the result of it is to make it out that the stream is navigable all-through the year."

I think the Subordinate Judge has misunderstood the District Munsif's finding. The Districct Munsif did not hold that the stream is navigable all through the year. In his opinion the fact that only small fishing craft passed through the stream after January is not enough to make it navigable, whereas in the view of the Subordinate Judge it is enough. The question, therefore, arises, whether, on the facts found, namely, that the stream is navigable for big boats for about six or seven months but for the rest of the year for small fishing craft only, the river can be held to be navigable throughout the year; and secondly, whether navigability throughout the year is necessary to make a river navigable for the application of the rule that a river which is tidal and navigable belongs to Government. Taking up the latter question first, the point was fully discussed in the judgment in *The Secceretary of State for India* v. *Venkatanarasimha Naidu* (1). Both the learned Judges held that for a river to be properly described as navigable it must be navigable throughout the year. Burn, J., observed at pages 222:

"Navigable has always been interpreted to mean 'navigable throughout the year.' *J. G Bagram* v. *The Collector of Bhulloo*a (2) *Chunder Jaleah* v. *Ram Churn Mookerjee* (3), *Mohini Mohan Doss* v. *Khajah Assanoollah* (4) and *The Secretary of State for India* v. *Bijoy Chand Mahatap* (5)."

1. (1920) M W N 209. 2. (1864) 1 W R 243.
3. (1871) 15 W R 212. 4. (1872) 17 W R 73.
5. (1919) I L R 46 C 390.

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'With reference to an argument of the Government Pleader in that case that the Calcutta decisions were based on the wording of the Regulation of 1825, he observed':

"Assuming this to be so, there seems to me to be no reason to suppose that the public rights in river beds are greater in Madras than in Bengal, at any rate where the banks form portion of permanently settled estates. No Madras authority has been cited which supports the claim now put forward."

Sadasiva Aiyar, J., also refers to the cases in *Chunder Jaleah* v. *Ram Churn Mookerjee* (3) and *The Secretary of Etate for India* v. *Bijoy Chand Mahatab* (5). In the decision in *The Secretary of State for India* v. *Bijoy Chand Mahatab* (5), Fletcher, J., relies on the earlier decision in *Chunder Jaleah* v. *Ram Churn Mookerjee* (3). The case went up on appeal to the Privy Council and was affirmed in the *Secretary of State for India* v. *Maharaja of Burdwan* (6). At page 110, Viscount Cave observes:

"From Guruchumbook up to Ampta that is to say, for a distance of about fourteen miles, the river is navigable at certain seasons only, and for present purposes may be treated as non-navigable."

At page 111 it was pointed out that the Subordinate Judge came to the conclusion

"that the whole bed of the river where it ran through the zamindari lands, and the bed *ad medium filum aquae* where it bounded those lands on one side only, was the property of the zamindar, and accordingly that the churs formed on these parts of the river-bed belonged to the zamindari."

At page 112 it was said,

"in dealing with this appeal their Lordships accept the concurrent findings of the Courts as to the ownership of the bed of the river and of the churs formed upon it since the date of the settlement."

It is clear from the above quotations that the Privy Council accepted Fletcher, J.'s view in *The Secretary of State for India* v. *Bijoy Chand Mahatab* (5). The decision in *The Secretary of State for India* v. *Venkatanarasimha Naidu* (1) was followed and the decision in *The Secretary of State for India* v. *Maharajah of Burdwan* (6) applied by Devadoss, J., in *The Secretary of State for India* v. *Bala Venkatarama Chetty* (7), but we are informed that the decision is the subject of a Letters Patent Appeal and I do not wish to rely on that case. But I cannot get over the reasoning of the Privy Council in the *Secretary of State for India* v. *Maharajah of Burdwan* (6) and I have

1. (1920) M W N 209. 3. (1871) 15 W R 212.
5. (1919) I L R 46 C 390.
6. (1921) L R 48 I A 565 : I L R 49 C 103 · 42 M L J 61 (P C).
7. (1926) 52 M L J 15.

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come to the conclusion that a river must be navigable throughout the year if it is to be regarded as a naviable river. The Learned Government pleader relied on *Orr Eving* v. *Colquhoun* (8). It is true that Lord Blackburn observed at page 847 that

"there is ample evidence that there had been, at least as long as living memory extended, a user by the public of the navigation in the river, dur- the period of the year when the water was high enough; .... and he does not entertain any doubt that the interlocutor, so far as it finds that the Leven is a navigable river free to the public, and that the Defenders have no right to execute works which obstruct the navigation, is right."

But on a closer examination of the case it shows that distinction was drawn between the ownership of the bed of the river and the right to navigate that, though the river was navigable in the sense that the public have a right to navigate it, he applied the rule of *medium filum aquae* to ascertain the ownership of the bed (vide page 854) and allowed the appeal on the ground that the appellant did not obstruct the public rgihts of navigation, by the pier he has erected, and for the purpose of the ownership he regarded the river as a non-navigable river (see page 856). This case does not therefore support the Government Pleader's contention. It is true that in America it has been held that it is not necessary that the river should be navigable throughout the year (see Farnham on Waters, Vol. 1, pages 100 to 102, Black's Pomeroy on Water Rights, page 463, S. 218, and Angle on Water Courses, p. 696, S. 537. But having regard to the observations of the Privy Council in *Srinath Roy* v. *Dinabandhu Sen* (9) referring to the observations of Chief Justice Tilghman in *Carson* v. *Blaser* (10) and President Porter in *Zimmerman* v. *Union Canal Company* (11), applied by Sadasiva Aiyar and Burn, JJ., in *The Secretary of State for India* v. *Venkatanarasimha Naidu* (1), it is unsafe to rely upon the American decisions and apply them to Indian conditions which are sometimes different. The branch of the Godavari near the suit lands is known as Addarapu kalva. The Telugu word "Kalva" generally means an artificial channel as opposed to a natural stream. It is clear that at the spot in question there must have been so many changes in the configuration of the branches of the river that the people have ceased to regard this branch as a natural stream. The width of the stream at the place as accepted by

1. (1920) M W N 209. 8. (1877) L R 2 A C 839.
9. (1914) L R 41 I A 221 : I L R 42 C 489 at pp 529 to 531 : 27 M L J 419 (P C).
10. (1810) 2 Binney 477. 11. (1856) 1 Watts and Sergeant 351.

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the courts below is not more than 100 links or 22 yards (see D. W. 1 quoted by the District Munsif in paragraph 28).

"At the time of the tide, there is no water in it."

D. W. 2 also says that at low tide the bed will be quite dry leaving a small quantity of water, knee deep and mud. The above statements are taken from the depositions of defendant's witnesses who will be naturally more inclined to support the defendant. The conditions of this branch seem to be far worse from the point of view of the navigability than those of the river Kistna discussed by Sadasiva Aiyar, J, in *The Secretary of State for India* v. *Venkatanarasimha Naidu* (1). The Government Pleader also attempted to argue that the river was as a matter of fact navigable throughout the year because small fishing craft are able to navigate it from January to July. But that small fishing craft may float over the water is not enough; small fishing craft are very often mere logs of wood on which fishermen sit while fishing and cannot be said to be useful for commercial purposes. In Farnham, Vol. 1, page 100, S. 23, it is observed:

"the term includes all waters which for a period long enough to be of commercial value are of sufficient capacity to float water craft for the purposes of commerce, or float to market the products of the country through which the water extends, so as to be useful to the population along its banks. This is alike the rule of the Civil, English, Common and American Law".

The rule is not satisfied by the mere fact that fishermen take fish from the stream for their own sustenance. The evidence does not show that there is any trade in the fish and that fish from the river are cured and exported to other places along the water way. If there is any doubt about the evidence I would certainly call for a fresh finding allowing further evidence if necessary but I have already extracted sentences from defendant's witnesses. They are far from showing that the river is navigable throughout the year even for small fishing craft. But, assuming as it is, it is not for commercial purposes. I have therefore come to the conclusion on the findings of the lower appellate court and on the materials before us that the river is not navigable throughout the year and therefore cannot be regarded as a navigable river and that no further finding need be called for on the matter. In view of my conclusion on the second point I am about to discuss, it is all the more unnecessary to call for a finding.

1. (1920) M W N 209, at pp. 210 & 211.

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I now proceed to discuss the second point in the case, namely, whether, by reason of the riparian rights of the plaintiff, he is entitled to use the water free of water-cess. On this matter, the history of the case law in this Presidency may be stated as follows: In *The Secretary of State for India* v. *Swami Narathesvarar* (12), it was held that, where water flowing from a Government source flowed through a sheet of water in an inam and then overflowed the inam, the inam was liable to pay water-cess. One might concede that where water from a Government source directly irrigates the inam, the inam is certainly liable to pay water-cess, but where the water from the Government source naturally flows into a tank or stream within the inam and then the water is used for irrigation, it is only natural rights that are being enjoyed and, therefore, the inam is not liable for water-cess. But, however, this view did not then prevail. This case was followed in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi* (13). In that case, where water from two hills, one belonging to the Government and the other to the private party, combined and flowed in a channel between Government and private lands and the water was used for irrigation by a private party, it was held he was using Government water; but to the extent that the accustomed flow at the time of the grant was utilised for irrigation, it was held that the inamdar was not liable to water-cess. But where more water was used than the accustomed flow at the time of the grant, it was held that he was liable to water-cess. In this decision, the decision of the High Court in the *Uralam Case, Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* (14), was followed. But the *Uralam Case* itself and this decision both went up to the Privy Council and I will refer to their effect later on. Meanwhile, before the Privy Council decisions were passed, there was some change in the trend of the decisions in the High Court itself. In *The Secretary of State* v. *Janakiramayya* (15) (a Letters Patent Appeal), it was held by Sadasiva Aiyar, J., that the presumption of ownership in flowing water is rebutted by showing that the bed of the stream over which water flows does not wholly belong to Government. Where half the bed belongs to a private owner, Madras Act III of 1905 cannot be held to

12. (1910) I L R 34 M 21 : 20 M L J 766. 13. (1910) I L R 34 M 366
14. (1910) I L R 34 M 295 : 20 M L J 823.
15. (1912) I L R 37 M 322 : 24 M L J 365.

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abrogate the ordinary juristic principles regarding flowing waters or to create a new kind of ownership in the Government in respect of them which entitles them to impose assessment. His view was that, if there are riparian rights and where the irrigation is limited to the exercise of such rights, there is no right to levy water-cess. But his view that half only of the bed belonged to Government did not prevail, and the other two Judges held in the opposite way. In *Sri Rajah Simhadri Raju* v. *The Secretary of State* (16), it was held by Spencer and Sankaran Nair, JJ., that where a right to take water is proved and established in a previous litigation, an engagement to give it free of water-cess should be implied, and Government could not levy water-cess. *The Secretary of State* v. *Janakiramayya* (15) was distinguished on the ground that it turned upon the question of the right to the bed; whereas in the case before them there was no riparian right, but the mokhasadars were enjoying the right as a matter of easement. It is somewhat difficult to follow the distinction. If in *The Secretary of State* v. *Janakiramayya* (15) the inamdar had a riparian right and if in *Sri Rajah Simhadri Raju* v. *Secretary of State* (16) the inamdar had a right to easement, one would think that the latter case is not stronger than the former. In *Prasad Row* v. *The Secretary of State for India* (17), the *Urlam case* decided by the High Court in *Kandukuri Mahalakshmanamma Garu* v. *The Secretary of State for India* (14) came up before the Privy Council; at p. 894 in discussing the Irrigation Cess Act Lord Parker observed:

"If, for example, a ripirian owner irrigates his land with water derived from a river or stream of which it can be truly said that it is a river or stream belonging to the Government, a cess would appear to be leviable even though the Government had never spent a single rupee in improving the source of supply. If, in order to avoid this result, reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner."

Here I wish to note that these sentences refer only to a case where the river or stream belongs wholly only to Government and it is only in such a case that the cess is *prima facie* leviable by Government and exemption could be

14. (1910) I L R 34 M 21 : 20 M L J 823.
15. (1912) I L R 37 M 322 : 24 M L J 365.
16. (1914) I L R 39 M 67 : 28 M L J 51.
17. (1917) L R 44 I A 166 : 40 M 886 : 33 M L J 144 (P C).

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claimed, if at all, only on the ground of an engagement within the meaning of the proviso. But where the river or stream cannot be said to belong wholly to Government, the observations that cess is *prima facie* leviable and therefore it is necessary to get exemption by reliance on the engagement are not applicable. Where the river or stream does not wholly belong to Government but only a half or no part of it, as where the owners of both sides are private owners and water from a Government source higher up flows into the river, it looks as if in the view of Lord Parker cess is not *prima facie* leviable. At p. 896, His Lordship then discussed the object of the proviso and his conclusion was that the object was to safeguard the obligation not to increase the jumma. At p. 897, he discusses the question whether the right to irrigate free of water-cess is limited to the mamul enjoyment at the time of the grant. Then after describing the various channels in the case, His Lordship observes at page 904:

"Obviously some right or easement of taking water from the river must pass. The only question is as to the measure of this right."

He then comes to the conclusion that the measure of the right is not the mamul of enjoyment at the time of the grant but the capacity of the easement granted as shown by the configuration of channels and sluices and such other features. At the bottom of page 905, he observes;

"Assuming, on the other hand, that the river Vamsadhara does not belong to Government, the right of taking water from it into each of the four channels could not depend on any easement created by virtue of the permanent settlement. It would depend in part upon the natural rights of riparian owners and in part on prescriptive rights existing at the date of, and passing under, the sanads, or acquired since the sanads were granted."

Then his Lordship observes:

"The construction of the sanads in the way their Lordships construe them has the advantage of being in ample accord with the known policy and objects of the permanent settlement. * * * * The policy was to encourage such progress".

Then he says at page 907 that conclusions of the lower courts were fallacious. The actual case was one of easement and not of riparian rights, but the way in which his Lordship discussed the construction of the sanads and the policy of the Government at the time of the settlement and used it for the purpose of determining the measure of the easement shows that exactly the same principles would apply to determine the effect of the

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grant even if it were not a case of easement but a case of riparian right. In fact the riparian right and the prescriptive right were put together in the paragraph immediately preceding the discussion of the construction of the sanad. It is true at an earlier page (895), His Lordship observed :

"It is a nice problem whether a riparian owner, who is exercising his natural or prescriptive right of taking water from a natural stream for purposes of irrigation, is taking water from a stream belonging to the Government within the meaning of the cess Act."

But that nice problem was only in respect of a stream wholly belonging to the Government. Where the stream does not wholly belong to the Government, but, on the other hand, partly belongs to the riparian owner or does not belong to the Government at all, it is not a nice problem. But assuming it is a nice problem in all the cases, there does not seem to be any doubt as to what the answer would have been from the manner in which the question is discussed, at page 906, though the matter had not to be decided in that case. But in the case immediately following it, namely, *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India* (18), which was on appeal from *The Secretary of State for India* v. *Ambalavana Pandara Sanadhi* (13), it was conceded by both the parties that the decision of the Privy Council in the *Urlam case* [*Prasad Row* v. *The Secretary of State for India* (17)] applied to that case also. When we remember that the case in *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi* (13) was the case of a channel in which water from a Government hill and a private hill combined and flowed and the channel flowed though the private owner's land, it is clear that the *Urlam decision* [*Prasad Row* v. *The Secretary of State for India* (17)] was held to extend to the case of riparian owners by the decision in *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India* (18). In my opinion the effect of the decision of the Privy Council in *Prasad Row* v. *The Secretary of State for India* (17) and *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India* (18) was not only to reverse the decisions in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* (14) and *The Secretary of State for India* v. *Ambalavana Pandara Sannadhi* (13), from which they arose in appeal, but also to reverse the decision of the majority in *The Secretary*

13. (1910) I L R 34 M 366. 14. (1910) I L R 34 M 295 : 20 M L J 823
15. (1912) I L R 37 M 322 : 24 M L J 365.
17. (1917) L R 44 I A 166 : I L R 40 M 886 : 33 M L J 144 (P C).
18. (1917) I L R 40 M 909 (P C).

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of State v. *Janakiramayya* (15). In *Lakshminarasu Avadhanulu* v. *The Secretary of State for India* (19) it was held that in the case of enjoyment of riparian rights the inamdar is not liable to water-cess. Sadasiva Aiyar, J., followed his own view in *The Secretary of State for India* v. *Janakiramayya* (15), for, though he was then in a minority, he now found he was at liberty to follow that view on account of the Privy Council decision in *Prasad Row* v. *The Secretary of State for India* (17). I entirely agree with the view taken in *Lakshminarasu Avadhanulu* v. *The Secretary of State for India* (19), as to the effect of the Privy Council decision. This view is further supported by the fact that the basis of the decision of the majority in *The Secretary of State* v *Janakiramayya* (15), namely, that the whole bed belonged to the Government, a view with which Sadasiva Aiyar, J., did not agree and by reason of which that case was distinguisred in *Sri Rajah Simhadri Raju* v. *The Secretary of State* (16), was itself overruled in the Full Bench decision in *Venkata Lakshminarasamma* v. *The Secretary of State* (20) [see also *Neelakandan Nambudripad* v. *The Secretary of State* (21)] so that, this is another reason why the decision in *The Secretary of State* v. *Janakiramayya* (15) ceases to be of any authority. And if the whole bed does not belong to the Government, that decision does not apply, there is no nice problem to decide and the principles of *Urlam Case* [*Prasad Row* v. *The Secretary of State for India* (17)], apply. In *The Secretary of State for India in Council* v. *Maharajah of Bobbili* (22), a decision of the Privy Council, Lord shaw after quoting the sentences of Lord Parker in *Prasad Row* v. *The Secretary of State for India* (17), at page 894, I have already quoted, referring to the natural or prescriptive right of the riparian owners, says:

"that question so reserved is the point now in issue. In their Lordships' opinion such an engagement should be implied in the circumstances already set out. The predecessors of the respondent were using the water as of right when the servient zamindari was forfeited to the crown in 1833; with the owners of that zamindari they had, to use the general

15. (1912) I L R 37 M 322 : 24 M L J 365.
16. (1914) I L R 39 M 67 : 28 M L J 51.
17. (1917) L R 44 I A 166 : I L R 40 M 886 : 33 M L J 144 (P C).
18. (1917) I L R 40 M 909 (P C). 19. (1917) 34 M L J 223.
20. (1917) I L R 41 M 840 : 35 M L J 159 (F B).
21. (1919) 12 L W 371.
22. (1919) L R 46 I A 302 : I L R 43 529 : 37 M L J 724 (P C).

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term employed in the statute, a good engagement. In taking the servient estate, this engagement accompanied the transaction, and the engagement was thereafter with the Crown."

In that case the riparian owner abutting on the channel had a right by prescription to take the water of a river through the channel over the lands of the Zamindar of Palkonda which were since forfeited to Government. It was held there was an engagement not to levy water-cess. Whether it is a natural right or a prescriptive right of the riparian owner, I do not see what difference it makes. The method of reasoning in *Prasad Row* v. *The Secretary of State for India* (17), the way in which it was conceded that it applies in *Ambalavana Pandara Sannadhi* v. *The Secretary of State for India in Council* (18), the decision in *Lakshminarasu Avadhanulu* v. *The Secretary of State for India in Council* (19) and finally the decision in *The Secretary of State for India in Council* v. *Maharajah of Bobbili* (22), all show that at this day no distinction can be made between the effect of a grant on the measure of irrigation rights granted, whether the enjoyment at the time of the grant was by an easement or as a riparian owner with natural or prescriptive rights. In the present case, the lower courts observe that the immemorial use of riparian rights by the plaintiff is not proved. In this observation the lower courts are, in my opinion, guilty of a misconception of law. A riparian right is a natural right and is not acquired by immemorial user. It exists by law, it may be lost by the adverse enjoyment of another, but it has not got to be enjoyed to be kept up. Whatever the enjoyment at the date of the grant may be, the measure of the right that passes is determined only by the configuration and the width of the river or stream. I therefore think in this case the plaintiff is entitled to draw water from the Addarapu Kalva in exercise of his rights as a riparian owner and so long as he does not exceed those rights he is not liable to water-cess. That in India rights of the riparian owner include also the right to take reasonable quantity of water for purposes of irrigation scarcely admits of any doubts.

In the result I would allow the appeal and decree the suit with costs throughout but only with interest at 6 per cent. instead of 12 per cent. claimed.

N. S. ——— *Appeal allowed.*

17. (1917) L R 44 I A 166 : I L R 40 M 886 : 33 M L J 144 (P C).
18. (1917) I L R 40 M 909 (P C). 19. (1917) 34 M L J 223.
22. (1919) L R 46 I A 302 : I L R 43 M 529 : 37 M L J 724 (P C).

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE WALLACE AND MR. JUSTICE BEASLEY.

The Commissioner of Income-tax, Madras ... *Referring Officer**

v.

Trichinopoly Tennore Hindu Permanent Fund, Ltd. ... *Respondent.*

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——
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Indian Income-tax Act (*XI of* 1922), *Ss* 3 *and* 10 (2) (iii)—*Mutual Benefit Society or Company—Distinction between—Permanent Fund—Registration as a Company under the Companies Act—Fund carrying on banking business—Loans granted to subscribers or shareholders as well as outsiders—No special concession to subsrcibers or shareholders—Fund if a company or Mutual Benefit Society.*

A Hindu Permanent Fund was registered as a Company under the Indian Companies Act. Its nominal capital was made up of 1,800 fully paid up permanent shares of Rs. 50 each which was called the 'paid up capital' and 2,333 term shares of Rs. 90 each payable in 45 monthly instalments of Rs. 2 which was called 'subscription capital'. The objects of the Fund according to its Memorandum of Association were 'to enable persons to save money' and 'to enable persons to secure loans at favourable rates of interest on sufficient securities'. The fund carried on banking business and its affairs were managed by a Managing Committee elected by the general-body of the members of the Fund which consisted of the shareholders of the Fund, *i.e.,* the permanent shareholders and the term shareholders or subscribers. The Managing Committee was granted power to invite deposits which consisted of security deposits, fixed deposits, monthly deposits and current deposits. These deposits were received from all persons whether members of the Fund or not. Loans were granted to the constituents of the Fund, *i.e.,* members or shareholders, depositors, and others on security. The profits of the Fund which were the excess of interest and other miscellaneous receipts over interest, payments, establishment pay and other miscellaneous charges were divided among the shareholders, directors, and charity funds in certain proportions.

Held, (on a reference by the Commissioner of Income-tax) that this Fund must be assessed as a Company and not as a Mutual Benefit Socitey. *Board of Revenue* v. *Mylapore Fund,* (1923) I L R 47 Mad. 1 (S B), and *New York Life Insurance Company* v. *Styles,* (1889) L R 14 A C 381, distinguished.

Case stated under S. 66 (2) of the Income-tax Act XI of 1922 for the decision of the High Court by the Commissioner of Income-tax, Madras:

I have the honour to refer, for the decision of the Hon'ble the Judges of the High Court, the following questions of law

*Refd. C. No. 12 of 1926. 5th May, 1927.

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which have arisen in assessing the Trichinopoly Tennore Hindu Permanent Fund:—

(1) Should this fund be assessed as a Mutual Benefit Society or as a Company, *i.e.*, should the assessment be made only on the income earned from non-members or on the total income?

(2) If the fund should be assessed as a Mutual Benefit Society, *i.e.*, only on its income from non-members, are the depositors members of the fund?

(3) Should the sums paid to the term shareholders and depositors in respect of subscriptions and deposits be deducted as expenditure incurred solely for the purpose of earning the profits or gains of the fund?

The recent history of the assessment of this fund is as follows:—

While the case of the Mylapore Hindu Permanent Fund was before the High Court, the Trichinopoly Tennore Hindu Permanent Fund along with other so-called Mutual Benefit Societies submitted a copy of a printed memorial to the Finance Department of the Government of India asking that they should be prescribed under the explanation to S. 10 (2) (*iii*), *i. e.*, that the recurring subscriptions paid by their shareholders or subscribers should be deemed to be capital borrowed for the purposes of the business. When the High Court's decision in *the case of the Mylapore Hindu Permanent Fund* (1) was announced, it was thought that there was no need for the Government of India to prescribe any Mutual Benefit Societies under the explanation mentioned above. I accordingly informed the Secretary to the Trichinopoly Tennore Hindu Permanent Fund that the Income-tax authorities would follow the decision of the High Court in respect of Mutual Benefit Societies, *i.e.*, would only assess the income not derived from members. On that understanding the Secretary withdrew his memorial to the Government of India. For the next two years therefore the Society was only assessed on its profits derived from non-members. For the year 1925-26, it made a return accordingly. The Income-tax Officer, however, looked more closely into the working of this particular fund and came to the conclusion that its constitution was different from that of other Mutual Benefit Societies and that it was not a Mutual Benefit Society because its transactions with outsiders constitute a very large proportion of its total transaction. He accordingly held that the society was a mere banking concern with a limited liability and taxed it on its total profits. This decision was upheld by the Assistant Commis-

1. (1923) I L R 47 M 1 (S B).

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sioner on appeal and the Fund has accordingly applied for a reference to the High Court on the questions set out above.

The petitioner Fund is a company registered under the Indian Companies Act. A copy of its Memorandum and Articles of Association is appended—Ex. A. The nominal capital of the company is Rs. 2,99,970 made up as follows:—

(*i*) One thousand eight hundred fully paid up permanent shares of Rs. 50 each amounting to Rs. 90,000. This is called the paid-up-capital.

(*ii*) Two thousand three hundred and thirty three term shares of Rs. 90 each payable in 45 monthly instalments of Rs. 2 amounting to Rs. 2,09,970. This is called 'subscription capital'.

The objects of the Fund according to its Memorandum of Association are:—

(*a*) to enable persons to save money,

(*b*) to enable persons to secure loans at favourable rates of interest on sufficient securities, and

(*c*) to do all such other things as are incidental or conducive to the attainment of the above objects.

The Fund carries on banking business and its affairs are managed by a Managing Committee elected by the General Body of members of the Fund (Articles 57 and 65). The General Body consists of the shareholders of the Fund, *i.e.*, the permanent shareholders and the term shareholders or subscribers (Article 2).

The Managing Committee of the Company is granted power to invite deposits (Article 30). The various classes of deposits received by the Fund are :—

(1) Security deposits (*i.e.*, deposits received from the office-bearers and staff of the Fund).

(2) Fixed deposits.

(3) Monthly deposits (*i.e.*, deposits received in successive monthly instalments for a period of 21, 45 and 83 calendar months and returned at the end of these periods with interest at 6¼ per cen per annum on the average amount deposited during the stipulated period).

(4) Current deposits.

These deposits are received from all persons whether members of the Fund or not. In fact, it is these deposits that form the bulk of the money-lending capital of the Fund.

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Loans are granted to the constituents of the Fund, *i.e.*, members or shareholders, depositors, and others on cash security, moveable security, immoveable security, and personal security (Article 37).

The profits of the Fund, which are the excess of interest and other miscellaneous receipts over interest payments, establishment pay, and other miscellaneous charges, are divided among the shareholders, *i.e.*, permanent and term shareholders, directors and charity funds in certain proportions (Article 55). The amounts paid to permanent shareholders are called 'dividends' and those paid to the term shareholders or subscribers are called 'profits' (Article 55). By-law 1 under Article 55 says:

"No dividends to shareholders or profits to subscribers shall be payable except out of the net profit arising from the business of the Fund."

The Fund claims on the strength of the judgment of the Madras High Court in *the Mylapore Hindu Permanent Fund case* (1) that it should be assessed only on the income derived from non-members, *i.e.*, from persons who are neither shareholders nor depositors of the Fund and requires me to refer to the High Court questions formulated at the beginning of this reference.

I am of opinion that the Fund is an ordinary trading concern and that the income derived by it from the exercise of its business should be assessed as a whole irrespective of the fact that a portion of its receipts is interest derived from transactions with its members. I consider that the decision of the Madras High Court in *the case of the Mylapore Hindu Permanent Fund* (1) which followed the decision of the House of Lords in the case of *The New York Life Insurance Co.* v. *Styles* (2) is inapplicable to the present case. The principle underlying the decision of the House of Lords in *Styles case* (2), as I understand it, is that when a number of individuals agree to contribute funds for a common purpose such as the payment of annuities or of capital sum or all of them on the occurrence of events, certain or uncertain, and stipulate that their contributions so far as they are not required for that purpose shall be paid back to them, the contributions so returned should not be regarded as profits. In distinguishing this case from that of *Last* v. *London Assurance Corporation* (3) decided by the same House of Lords, Lord Watson observed:

"In *Styles case* there are no shares or shareholders in the ordinary sense of the term, but each and every holder of a participating policy be-

1. (1923) I L R 47 M 1 (S B). 2. (1889) L R 14 A C 381.
3. (1885) L R 10 A C 438 : 2 Tax Cases 100.

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comes *ipso facto* a partner of the company with a voice in the administration entitled to a share of its assets and liable for all losses incurred by it".

In the Mylapore Hindu Permanent Fund the share-holders were the only constituents of the Fund. It was they that subscribed the capital, took loans and paid the interest which was subsequently returned to them as profits. Relying on the decision of the House of Lords in *Styles' case* (2), the High Court held that, apart from the small amount invested outside in Government securities, the surplus was income earned from within, that is, from the members themselves, and that it was not profit which was chargeable with income-tax.

It seems to me that the facts of the present case are altogether different from those existing in *the case of the Mylapore Hindu Permanent Fund* (1). Here there is a company registered under the Company's Act with a share capital subscribed by its members. It invites deposits from persons who are not shareholders of the Fund and lends monies in the course of its business to all persons whether they are members of the Fund or not. In fact, the bulk of its transactions were with persons who are not members or shareholders of the Fund. For example, during the year of account, the receipts of the fund from its shareholders amounted to Rs. 6,633, whereas the interests received from the depositors (who are not members or shareholders in the Fund) amounted to Rs. 15,883 and the interest received from those who are merely borrowers and have no other connection with the fund amounted to Rs. 15,510. Under Articles 2 and 57 the depositors and borrowers have nothing to do with the management of the Fund; nor do they participate in the earnings of the Fund. The earnings of the Fund are distributed among its shareholders alone and the Fund, *i. e.*, the company actually earns the profits that are ultimately distributed. In *the case of the Mylapore Hindu Permanent Fund* (1) a certain number of people pooled money and divided it up among themselves and it was held that they could not be making a profit out of the process. In the present case this element of mutuality is absent. The Trichinopoly Tennore Hindu Permanent Fund is not a closed circle. As far as its receipts from its own members are concerned, it is in the same position as a Railway Co. carrying its own shareholders or a bank lending money to its shareholders.

1. (1923) I L R 47 M 1 (S B). 2. (1889) L R 14 A C 381.

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Question (*ii*) :—Under Article 2 of the Articles of Association of the Fund the General Body, which alone has a voice in the management of the Fund, comprises only permanent shareholders and subscribers. The depositors are not members of the General Body. Under Article 8 the term "members" includes shareholders (holders of permanent shares) and subscribers (term shareholders) but not depositors. Under Article 55 the depositors are not entitled to participate in the profits of the Fund nor are they liable for its losses (Article 34, By-law 1 (*e*). These facts make it clear that the depositors are not 'members' of the Fund.

Question (*iii*) :—As far as the depositors are concerned, this question is based on a misapprehension. The depositors are only paid interest on their deposits and every interest payment has been allowed by the Income-tax Officer. The real question at issue is whether the portion of the profits which is distributed to the term shareholders is to be regarded as interest on borrowed capital. The petitioner wishes to bring this profit under the category of the 'guaranteed interest' to which reference was made in *the Mylapore Hindu Permanent Fund's* case (1). But here there is no such thing as guaranteed interest. The subscriber pays rupees two a month for 45 months. At the end of that period he ceases to be a shareholder and is entitled to a refund of the sum of rupees nienty subscribed by him. He is not guaranteed anything more, whereas in the *case of the Mylapore Hindu Permanent Fund* (1) the shareholder paid Rs.84 and was entitled to receive Rs. 102½. In this case, according to Article 55 (1) of the by-law, no dividends to shareholders or profits to subscribers are paid except out of the net profit arising from the business of the Fund. There is thus a radical difference between the two cases. The sums paid to the term shareholders or subscribers are ordinary dividends or share of profits and seem to me clearly inadmissible as deductions from taxable profits. If the petitioners had pressed their memorial of February 1923, there would have been a full enquiry before any exemption was granted and I do not think that the benefit of the exemption would have been extended to a company such as this which derives 82 per cent. of its receipts from non-members.

M. Patanjali Sastri: Special Counsel for the Commissioner of Income-tax.

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1. (1923) I L R 47 M 1 (S B).

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M. Subbaraya Aiyar for respondent.

The Court delivered the following

JUDGMENT :—In this reference three questions have been referred to this Court by the Commissioner of Income-tax. Of these, questions Nos. 2 and 3 have not been pressed. Then question No. 1 remains, that is :

"Should this Fund be assessed as a Mutual Benefit Society or as a Company?"

The Commissioner of Income-tax has decided that the Fund is not a Mutual Benefit Society and is therefore not entitled to the benefit of the ruling of this Court reported in *Board of Revenue* v. *Mylapore Fund* (1).

In the main this question is a question of fact and this Court will not differ from the finding unless that finding is vitiated by some error of law. The chief contention of the learned vakil who appears for the Fund is that the Commissioner has radically misunderstood the constitution of the Fund as set out in its Memorandum of Association and its Articles.

The point at issue is whether the Fund is a society constituted essentially for the mutual benefit of its members or whether it is an ordinary money lending bank engaging in money lending with a view to earning profit for distribution among its shareholders. A legal definition of a Mutual Benefit Society has not been set out in any statute and we do not attempt such a definition here as it is not necessary. The claim put forward here on behalf of the Fund is that it is of the same nature and constituted on the same footing as the New York Life Insurance Co. in the reported case of *The New York Life Insurance Company* v. *Styles* (2) and as the Mylapore Hindu Permanent Fund in the case reported in *Board of Revenue* v. *Mylapore Fund* (1). If that claim is substantiated, then by force of these rulings the present fund will be Mutual Benefit Society. We shall therefore examine that claim.

The New York Life Insurance Company was founded on principles of Mutual Life Insurance. Two sorts of policies were issued, participating policies and non-participating. There were no shares, but the holder of every participating policy became *ipso facto* a partner while the holder of a non-participating policy was a mere creditor, without any interest in the assets or liabilities of the Company. The rate of premium for participating policy holders was calculated from time to time

1. (1923) I L R 47 M 1 (S B). 2. (1889) L R 14 A C 381.

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at a figure sufficient to cover the probable disbursements. Then an account was taken of the transactions of the company and the excess, if any, of premiums received over expenditure was returned or repaid to the members. The essential condition in the constitution of this company was that the contributions of the members so far as they were not required for the common purpose of the company should be repaid to them; that is, the aim of the company was not to make a profit for distribution to members but to make no profit; any realisation of profit meant that the purpose of the company had so far been imperfectly fulfilled because too large a contribution had been levied. The return of such profit, if it could be called profit, to the members was merely a return to them of the excess of contribution which had been levied from them and any dividend, if it can be called a dividend, was paid to them not as shareholders but as policy holders. In the report of that case, at p. 411, Lord Macanawghten says :

> "What is to become of the surplus if everything goes right? The practice is to take an account every year of assets and liabilities and to give the insured the benefit of the surplus either by way of reduction of premium or by way of addition to the sum insured. It can make no difference in principle whether the surplus is so applied or paid back in hard cash. In either case it is nothing but the return of so much of the amount contributed as may be in excess of the amount really required I do not understand how this excess can be regarded from any point of view or for any purpose as gain or profit earned by the contributors".

That this was the principle underlying this decision is also the view adopted by Rowlatt, J., in *Liverpool Corn Trade Association* v. *Monks* (4), and it has been applied to a similar case *Thomas* v. *Richard Evans & Co. and Jones* v. *South West Lancashire Coal Owners' Association* (5), where the company was an association founded solely for affording indemnity to its members against compensation in respect of fatal accidents to workmen. In *the case of the Mylapore Hindu Permanent Fund* (1), the learned Judges held that it was on all fours with the New York Life Insurance Co., since the income did not come from outside, but from inside, and was therefore not taxable. There the capital was made up solely of investments by members, and the income was derived from interest earned on loans to members. The essence of the Society was mutuality and the members and constituents were one and the same.

1. (1923) I L R 47 M 1 (S B).
4. L R (1926) 2 K B 110. 5. L R (1927) 1 K B 33.

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Now we have to see whether the constitution of the present company is at all on those lines of mutuality. Its object as set out in the Memorandum of Association is "to enable persons to save money" and "to secure loans at favourable rates of interest." This is a perfectly general object and there is no hint that those who are to be enabled to save money or to secure loans are confined to the members of the company, or that the essence of the object is the low rate of interest, so that, for example, the purpose aimed at is not profits but a lowering of the rate of interest as far as possible. The stated object of this Fund is not incompatible with a purely business effort to make as much profit as possible out of lending money on favourable rates of interest. The capital paid up or subscribed is made up of shares limited in number and in value, and the shareholders and subscribers constitute the controlling authority while membership is restricted to such shareholders or subscribers. Outside these members is a class called monthly depositors who are, by a by-law under Article 34, practically on the same footing as subscribers but are not subject to the losses and liabilities of the Fund. Here the principle of mutality, if it existed before at all, is entirely abandoned. Loans are granted to any one and are of two kinds,'term loans' restricted to subscribers and monthly depositors and 'temporary loans' to any constituent. There is no special concession whatever which is confined to shareholders and subscribers. They are exactly on the same footing as outsiders for example, monthly depositors. Profits are distributed in the way of dividends in the ordinary business fashion and are expressed to be "out of the net profit arising from the business of the Fund". See Art. 55 (I-a). There is no suggestion that the dividends paid to the shareholders and subscribers are mere by way of return of their original capital subscribed and, as we noticed, there is no hint that the aim of the company is not to make a profit by lending money on interest. We find therefore in the constitution and objects of this fund no purpose of mutual benefit, no society of persons banded together to lend money to each other, no benefit to be obtained by, or derived from, membership alone. The constitution of this fund therefore differs fundamentally from that of the New York Life Insurance Co., or the Mylapore Hindu Permanent Fund, and the claim of the fund that they are entitled by virtue of the rulings in those cases to be exempt from taxation in regard to any of their profits cannot be sustained. The Commissioner had made no mistake in

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holding that there is here no mutal benefit society and that the net profits of the fund are taxable in full

We must therefore answer this reference that this Fund should be assessed as a Company. The Fund will pay the costs of this reference which we fix at Rs. 250.

N. S. *Reference answered against the Fund.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

SIR WILLIAM PHILLIPS, *Kt., Officiating Chief Justice,* AND MR. JUSTICE ANANTAKRISHNA AIYAR.

The Official Assignee of Madras ... *Appellant**

v.

S. M. Sheik Moideen Rowther ... *Respondent.*

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Presidency Towns Insolvency Act, S 55—Transferee for valuable consideration—Good faith—Proof of.

A purchaser or an encumbrancer, in order to be entitled to the protection under S. 55 of the Presidency Towns Insolvency Act, must prove not only that he paid valuable consideration but also he acted in good faith.

The onus of proving good faith is on the transferee and it will depend on the circumstances of each case whether good faith has been proved or not. Absence of good faith can be proved not only by showing that the transaction was a sham one or that there was a resulting trust in favour of the insolvent but also by other circumstances. If an insolvent transfers all his properties in favour of one of his creditors to whom he owes much more than the debt due to the transferee, and the transferee also being fully aware of all the above circumstances and in concert with the insolvent brings into existence such a transfer deed and antedates the same and takes such a sale deed for debt due to him without any contemporaneous advance or other promise to help the insolvent to carry on his business, the transaction cannot be said to have been entered into in good faith.

The Official Assignee of Bengal v. *The Yokohama Specie Bank, Ltd,* (1924) 29 C W N 374, referred to.

On appeal from the judgment of the Honourable Mr. Justice Beasley, dated 14th September, 1926, passed in the exercise of the Ordinary Original Insolvency Jurisdiction of the High Court in I. P. No. 110 of 1924 in Application No. 423 of 1924.

O. Thanikachalam Chettiar with *R. Ramachandra Chetty* for appellant.

K. Krishnaswami Aiyangar with *V. Varadaraja Mudaliar* for respondent.

The Court delivered the following

JUDGMENT :— S. M. K. Mohamad Rowther was adjudicated insolvent on 31st March, 1924, on a petition filed on 17th

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*O. S. Appeal No. 106 of 1926. 29th August, 1927.

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March, 1924, by a creditor Chengalvaraya Chettiar. The Official Assignee of Madras applied to have a sale deed, dated 27th October, 1923, and a deed of transfer of mortgage, dated 11th November, 1923, executed by the insolvent in favour of the garnishee (S. M. Sheik Moideen Rowther) declared void under S. 55, or in the alternative under S. 56, of the Presidency Towns Insolvency Act. The learned Judge having dismissed the application, the Official Assignee has preferred this appeal.

The insolvent was carrying on business as a commission agent at Madras. He had a branch shop in Tinnevelly. In 1923 the insolvent was largely indebted. He was indebted to the garnishee to the extent of about Rs. 20,000 in May 1923, and he had executed in favour of Chengalvaraya Chettiar a promissory note on 1st October, 1923, for Rs. 30,000, the amount having been advanced to the insolvent between 25th June and 30th September, 1923. The garnishee is the paternal uncle of the insolvent and the sale deed, Ex. IV, executed by the insolvent in favour of the garnishee comprised all the immoveable properties of the insolvent. It was also alleged that the properties comprised in the sale deed were worth very much more than Rs. 10,000, the consideration mentioned in the sale deed. Under Ex. V, dated 11th November, 1923, the insolvent transferred for Rs. 775 to the garnishee the mortgage rights of the insolvent in certain immoveable properties in Tinnevelly, the principal amount of the mortgage being Rs. 500. It was also alleged that Ex. IV was not executed on the date it bears (27th October, 1923), but that it was executed only about the 20th December, 1923, the date of registration; finally it was alleged that the garnishee was aware of the insolvent's indebtedness to Chengalvaraya Chettiar and others and that Ex. IV was taken with full knowledge of the fact that it comprised all the properties of the insolvent and that the same was a fraudulent transaction and void as against the Official Assignee. The learned Judge in dismissing the application concluded his judgment as follows:—

"The Official Assignee has not in my view discharged the burden on him of showing that the sale was not *bona fide;* it clearly was in my view for valuable consideration and the only way in which the *bona fides* of the transaction might have been impeached was by showing that for some reason or other the executoin of the sale deed was not on the date it bears. That as I have said the Official Assignee has failed to prove. The official Assignee having failed to show that the sale was not for valuable

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consideration and that it was not *bona fide*, this application must be dismissed with costs."

On behalf of the appellants the following main contentions were raised by his learned Counsel.

1. That the deed of sale was not executed at Pettai a suburb of Tinnevelly on 27th October, 1923, the date mentioned in the document, but that it was antedated and executed only about the time of its registration at Tinnevelly on 20th December, 1923.

2. The consideration mentioned in the document Rs. 10,000 is grossly inadequate, the properties being really worth about Rs. 20,000.

3. The amount due to the garnishee at the time was only about Rs. 7,000 and the recital in the document that more than Rs. 10,000 was due to the garnishee from the insolvent at the time is false and fraudulent.

4. That the document Exhibit IV could not be said to have been executed in good faith and consequently the transaction is void as against the Official Assignee under S. 55 of the Presidency Towns Insolvency Act.

5. That the case is also one of fraudulent preference coming within S. 56 of the Act and consequently the transfer is void as against the Official Assignee.

Before discussing the questions raised by the appellant it would be convenient to state that the *onus* of proving that a particular transfer effected by the insolvent is void against the Official Assignee under S. 56 of the Act is on the Official Assignee, whereas the onus of proving good faith and valuable consideration in a case coming under S. 55 would be on the garnishee. This was admitted before us by the learned Counsel on either side appearing in the case, and we think the decisions of this Court reported in *The Official Assignee of Madras* v. *Sambanda Mudaliar* (1) and the Calcutta High Court reported in *Nripendra Nath Sahu* v. *Ashutosh Ghose* (2) *and Nilmoni Choudhuri* v. *Bashanta Kumar Banerji* (3) *and The Official Assignee of Bengal* v. *Yokohama Specie Bank, Ltd.* (4) fully support the position.

Before discussing the evidence in the case we should mention that the insolvent died in January 1924, without filing any schedule of assets and liabilities. His account books have not

1. (1920) I L R 43 M 739 : 39 M L J 345.
2. (1914) 19 C W N 157. 3. (1914) 19 C W N 865.
4. (1924) 29 C W N 374.

been produced. Kadir Moideen Rowther, the fourth witness examined on behalf of the Official Assignee was formerly a gumastah of the insolvent. He has deposed that the garnishee is the heir of the insolvent and that all the accounts of the insolvent had been handed over to the garnishee. The garnishee was examined by a Commissioner in Tinnevelly, as also his witnesses including an attestator to Exhibit IV, and the garnishee's accountants Sebastian Pillai and Velayudan Pillai. Under ordinary circumstances the garnishee as well as his accountants, though residents of Tinnevelly, would have to be examined in Court in Madras, which would have been more satisfactory than their examination by a Commissioner at Tinnevelly. It would appear that applications were made to the High Court first to have some witnesses (other than the garnishee and his accountants) examined on commission and subsequently for similar examination of the accountants and the garnishee also. None of the witnesses examined by the Commissioner at Tinnevelly were cross-examined on behalf of the Official Assignee—the Official Assignee not having succeeded in his attempts to have the proceedings before the Commissioner adjourned. On the 24th of December, 1925, the Commissioner sent a registered notice to the Official Assignee appointing 2nd January, 1926, for examination of the witnesses. The Christmas holidays intervened and though the Official Assignee wired to the Commissioner on 29th December, 1925 to postpone the enquiry, the Commissioner replied by wire on 30th December, 1925 that, as the time for return of the Commission was 4th January, he adjourned the inquiry to 4th January, 1926, and the District Munsif ordered extension only for the examination of the garnishee till 9th January, 1926. Thus only the garnishee was cross-examined on behalf of the Official Assignee before the Commissioner. In the circumstances one is not surprised to find gaps in the evidence and there are circumstances appearing in the case on which more light could probably have been thrown had the garnishee and his accountants been examined before the learned Judge in Madras. These circumstances have to be kept in view in discussing the evidence adduced in the case.

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The first question is whether the sale deed, Ex. IV, was executed on the date it bears—that is, on 27th October, 1923. It is admitted that the insolvent was in Madras on 26th October, 1923, he having attended the Madras Presidency Magistrate's Court on that day.

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The case for the garnishee is that the insolvent left Madras on the evening of the 26th October, 1923, by the Boat Mail, (which leaves Madras at about 8 p. m.) and reached Tinnevelly Railway Station in the evening of the 27th at about 6 p.m. and and went straight to Pettai (which is about 3 miles from the station) and that the sale deed was written in the handwriting of the insolvent himself on the night of the 27th soon after his arrival at Pettai. It is said that the insolvent left Tinnevelly for Madras on the morning of the 28th, saying that he had a criminal case in Madras to attend to, and reached Madras on the morning of the 29th October. It is admitted that the criminal case was to be heard only on or about the 12th November. It is difficult to believe that after a tedious railway journey of about 22 hours the insolvent would have undertaken the engrossing of the sale deed in his own handwriting soon after his arrival at Pettai, and in the night of the 27th. It looks rather strange that he is said to have left Tinnevelly on the morning of the 28th for Madras without staying at Tinnevelly for registering the document, more especially as nothing necessitating his presence at Madras in such a hurry is proved. The sale deed is written on several sheets of paper and would evidently have taken some considerable time to write. It is also difficult to believe why the insolvent did not stay in Tinnevelly and register it on the 28th When pressed with the question as to how he was able to have the document executed at Tinnevelly on the night of the 27th, the garnishee explained that the stamp paper for the sale deed had been purchased on the 16th October, 1923, and the draft sale deed had been prepared two weeks before the stamp was purchased. Thus the draft sale deed was according to the granishee prepared about the 2nd October, 1923 and given to him by the insolvent. The statement about the draft cannot be believed inasmuch as nothing regarding the same was mentioned either in the correspondence that passed between the garnishee and his gumastah Sebastian Pillai or in the notice issued by the garnishee's pleader to the insolvent. (See Ex. IX, dated 21st October, 1923, Ex. X, dated 22nd October, 1923, and Ex. VIII, dated 24th October, 1923). The absence of any mention of the agreement to sell (said to have been entered into between the insolvent and the garnishee on the 2nd October, 1923) and of the draft sale deed in the above correspondence makes it clear that the story about a draft having been already prepared on the 2nd October, 1923, and handed over to the garnishee by

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the insolvent is probably false. On the other hand we have evidence of witnesses who say that the insolvent was in Madras on all the three days 26th, 27th and 28th of October. Kadir Mohidin Rowther who was a gumastah of the insolvent states that both the deeds in question, Exs. IV and V, were executed at Madras, on the 11th of November, 1923. It is urged that the statement of the witness could not be relied on, since the other statement made by the witness about the repayment of Rs. 15,000 to the garnishee by the insolvent out of the amounts borrowed by the insolvent from Chengalvaraya Chettiar is obviously false, but this is certainly not proved, as the insolvent's accounts have not been produced. But we have got the evidence of an apparently respectable and disinterested witness, Rangaswamy Aiyangar, the first witness examined on behalf of the Official Assignee. Rangaswamy Aiyangar is an auditor in the Accountant General's Office, Madras, drawing a pay of Rs. 170 a month. He was a friend of the insolvent and his evidence shows that the insolvent was at Madras on the 26th, 28th and the 29th of October. It is admitted that the insolvent sold his horse and carriage at Madras on the 29th of October. (See the receipt Ex. B, dated 29th October, 1923.) The 2nd witness states that he saw the insolvent at Triplicane on the 26th of October, between 8 and 9 in the morning. Chengalvaraya Chettiar who purchased the horse and the carriage also states that he saw the insolvent at Madras on the 27th, 28th and 29th of October. There is no sufficient reason for disregarding this oral evidence in the circumstances. The learned Judge was evidently under some misapprehension when discussing the question whether it was possible for the insolvent to leave Madras on the night of the 26th October for Tinnevelly and be at Tinnevelly on the 27th, and at the same time be at Madras on the 28th. He seems to assume that the insolvent could have been at Madras on the 28th and yet be at Tinnevelly on the night of the 27th. Having regard to the distance between Madras and Tinnevelly and the time necessarily taken for the journey by train, there could be no basis for such an assumption. There are two attesting witnesses to Ex. IV, one of whom is dead, and the other Peer Mohidin Rowther has been examined as garnishee's 8th witness. He is evidently rich, but as deposed to by Kadir Mohidin Rowther, the garnishee is a brother-in-law of the said attesting witness —the garnishee having married the sister of Peer Mohidin. Having regard to all the circumstances we find it difficult to

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resist the conclusion that the document, Ex. IV, was not executed on the date it bears and that the garnishee's story about the date and place of its execution cannot be believed. It is important to note that the garnishee's account books, Ex. XXI series, do not contain any contemporaneous entries relating to the purchase of stamp paper on the 16th of October, or about the sale deed having been executed on the 27th of October. In the usual course of business, credit should have been given to the insolvent on the 27th of October for Rs. 10,000 mentioned as the consideration for sale deed, Ex. IV, if it had been executed and delivered to the garnishee on the date. It is admitted that it was only on the 20th December, the date on which Exs. IV and V were registered, that entries were made of the expenses relating to stamp paper and giving credit for the consideration showed in Exs. IV and V, namely the amounts of Rs. 10,000 and 775 respectively. No doubt, the entries on the 20th of December state that credit is to be given for these amounts as and on the 27th of October and the 11th of November, respectively. There is absolutely no explanation as to why these entries were not made on the respective dates as they should have been in the usual course of business. Thus the entries in the garnishee's own books seem to us to corroborate the oral evidence that Ex. IV was not executed on the 27th October. It is to be regretted that the insolvent's account books are not before the Court. On the whole we have come to the conclusion that Ex. IV was not executed on the 27th of October, 1923, but that it was antedated by the parties thereto.

As regards the 2nd and 3rd points namely the value of the properties covered by Ex. IV and repayment of Rs 15,000 to the garnishee, by the insolvent, we are not satisfied that the appellant has proved his contentions on these heads, though having regard to the fact that on 15th June, 1921 the garnishee was prepared to take properties covered by the first and 2nd schedules only of Ex. IV as security for Rs. 10,000 and seeing that the value of the properties covered by 3rd schedule of Ex. IV is about Rs. 2,400, it is possible that the properties included in Ex. IV were worth more than Rs. 10,000 in 1923. But the evidence on record is not definite enough to us to say that the price of Rs. 10,000 mentioned in Ex. IV is grossly inadquate. It does not seem that this portion of the case as regards valuation of the property was properly pressed before the learned Judge Otherwise it is difficult to understand the following observation of the learned Judge:

"The evidence on behalf of the garnishee is evidence taken on commission and it goes to show that the property was worth at least equal to the consideration set out in the sale deed and this evidence has not been contradicted in any way".

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Ex. VI is not referred to by the learned Judge in his judment. As regards the repayment of Rs. 15,000 it is spoken to only by Kadir Mohidin Rowther, gumastah of the insolvent; and though having regard to the evidence given by that witness materially in favour of the garnishee in one important respect (we refer to the statement by the witness that Exhibits IV and V were executed on the 11th of November, 1923, which would be more than three months prior to the creditor's petition), it could not be said that the witness was inimical to the garnishee, yet on the whole we are not prepared to differ from the learned Judge on this point. We accordingly find against the appellant on points 2 and 3 mentioned above.

In the face of the statement made by Kadir Mohidin Rowther that the documents were executed on the 11th of November, 1923, we hold that the Official Assignee is not entitled to relief under S. 56 of the Act, but we hold that he is entitled to the relief that he seeks under S. 55.

The garnishee and the insolvent were near relations, the garnishee being the paternal uncle of the inslovent. The insolvent had a branch shop at Tinnevelly where the garnishee was carrying on his own business. Though the garnishee had transactions with the insolvent on a large scale some years previously, the subsequent dealings were only on a comparatively small scale. The garnishee was anxious in 1921 to take security, but did not take steps to complete the security bond, Ex. VI, being assured by the insolvent that the amount would be repaid from the collections of a chit fund. The garnishee admitted that in 1923 on account of certain rumours the garnishee came to know that the insolvent's representations were not true. The garnishee also (Para. 6 of the garnishee's counter affidavit) admitted that all the properties were included in the sale-deed, Ex. IV. Though the garnishee stated in his deposition that he did not ask the insolvent whether he had any liabilities, we have no doubt that the garnishee had full knowledge of the insolvent's liabilities at the time. We have found that the document Ex. IV was antedated. The garnishee took an assignment not only of all the immoveable properties of the insolvent, including dwelling houses, but he took also an assignment of the mortgage rights possessed by the insolvent in res-

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pect of a mortgage for the principal sum of Rs. 500 and interest (Ex. V). If the garnishee's case about the draft sale-deed is respected, then it is clear that after executing a promissory note to Chengalvaraya Chettiar on 1st October, 1923 for Rs.30,000 the insolvent agreed to sell all the properties to the garnishee for Rs. 10,000 on the very next day namely the 2nd of October. The garnishee's clerk was sent to Madras to gather information about the state of the insolvent's business and it is impossible to believe that the garnishee did not know that the insolvent was heavily indebted in Madras. There is evidence that the insolvent owed moneys to two other creditors in addition to Rs. 30,000 that he owed to Chengalvaraya Chettiar. No doubt no schedule of assets and liabilities has been filed, the insolvent being dead. In the circumstances of the case we are inclined to think that the garnishee has got possession of the account books of the insolvent and has withheld the production of the same; the said account books, if produced, would have been of very great use in the decision of this case. When confronted with the question as to whether he would have taken the sale deed Ex. IV if he had known that the insolvent was indebted to Chengalvaraya Chettiar in the sum of Rs. 30,000, the garnishee stated that, even if he had known that the insolvent had other debts, he would have purchased the property as his debts should be realised. We hold that the garnishee knew when he took Ex. IV that the insolvent was indebted to Chengalvaraya Chettiar to the extent of Rs. 30,000 and also to some others and that he (insolvent) had no other properties. Knowing all this the garnishee took an assignment of all the insolvent's properties and antedated the sale deed—knowing full well that what was being done was in fraud of the insolvency law. He cannot be said to have acted in good faith in the circumstances of the case.

The learned Counsel for the respondent argued that the present case does not come under S. 55 of the Presidency Towns' Insolvency Act. Under that section any transfer of property not being a transfer made before and in consideration of marriage or made in favour of a purchaser or encumbrancer in good faith and for valuable consideration shall if the transferor is adjudged insolvent within two years after the date of the transfer be void against the Official Assignee. It will be noticed that it is only in favour of purchasers and encumbrancers in good faith and for valuable consideration that the exception

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is made. In the present case the respondent has proved valuable consideration, but he has to prove good faith also. The respondent's Counsel argues that the expression 'good faith' in the section means only that the transaction should not be a sham one or one in which there is a resulting trust in favour of the insolvent, and he contends that, as neither of those two objections could be urged in the present case, the transaction is binding on the Official Assignee We are unable to accept that contention. Absence of good faith could be proved by showing that the transaction was a sham one, or that there was a resulting trust in favour of the insolvent, but the same could be proved by other circumstances also. If an insolvent transfers in favour of one of his creditors to whom he owes much more than the debt due to the transferee and the transferee also being fully aware of all the above circumstaces and in concert with the insolvent, brings into existence such a transfer deed, and antedates the same, and takes such sale deed for debt due to him without any contemporaneous advance or other promise to help the insolvent to carry on his busines, then we have no doubt that the transaction could not be said to have been entered into in good faith, and the same should be held to be void against the Official Assignee under section 55 of the Act. The cases referred to by the respondent, *Hakim Lal* v. *Mooshahar Sahu* (5) and *Musahar Sahu* v. *Lala Hakim Lal* (6), are cases that were decided under section 53 of the Transfer of Property Act and not under the Insolvency Act. In fact at page 1015 of *Hakim Lal* v. *Mooshahar Sahu* (5).

"It is well-settled that in the absence of a Bankruptcy Act, a debtor may make preference amongst his creditors even to the extent of transferring all his property to one creditor to the exclusion of the others."

Note the words 'In the absence of a *Bankruptcy Act!*' The Privy Council also in *Musahar Sahu* v. *Lala Hakim Lal* (6) makes a similar observation. At page 524 it is said:

"As a matter of law their Lordships take it to be clear that in a case in which no consideration of the law of bankruptcy applies, there is nothing to prevent a debtor paying one creditor in full and leaving others unpaid, although the result may be that the rest of his assets will be insufficient to provide for the payment of the rest of his debts."

In fact we have cases arising under the Insolvency Act where it has been held that under similar circumstances the transfer would be void as against the Official Assignee. In *The Official*

5. (1907) I L R 34 C 999.
6. (1915) L R 43 I A 104 : I L R 43 C 521 : 30 M L J 116 (P.C).

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Assignee of Bengal v *Yokohama Specie Bank, Ltd.* (4), Sanderson, C. J., and Buckland, J., held that an assignment executed in favour of one of the creditors of the insolvent of all the properties of the insolvent without any contemporaneous advance was void against the Official Assignee when the transferor was adjudicated insolvent within two years after the date of the transfer. Finding that the transferee had knowledge of the state of affairs of the assignor at the time of the assignment, the Court held that the transfer was not in *good faith* within the meaning of S. 55 of the Act. Justice Buckland was of opinion that in considering the effect of transactions of such a nature, the facts must be considered in the light of the law of Bankruptcy, the object of which is to ensure rateable distribution of an insolvent's property among his creditors and that a transaction which may in other circumstances be free from all taint would become an offence when it is established that it contravenes the law of Bankruptcy. Justice Buckland further remarked that

> "Though the bank (transferees) may have acted honestly in the popular sense, they cannot be deemed to have acted in good faith within the law of Insolvency, however honestly they may have endeavoured and thought they were justified in endeavouring to secure the property of the insolvent as security for their own debt."

We may also refer in this connection to a passage in the Privy Council decision reported in *Khoo Kwat Siew* v. *Wooi Taik Hwat* (7) where Lord Hobhouse observed as follows:

> The well-known rule of law is that, if a trader assigns all his property, except on some substantial contemporaneous payment, or some substantial undertaking to make payment *in futuro*, that is an act of bankruptcy, and is void against the creditors and the assignee, simply because nothing is left with which to carry on his business, whereas, if he receives substantial assistance, something is left to carry on the business."

In *Jukes in Re : Official Receiver ex parte* (8), Wright J., remarks as follows:

> "I think it is quite clear that the debtor committed an act of bankruptcy in parting with the whole of his property to one of his creditors to satisfy a past debt..... I cannot help thinking that if a creditor takes the whole, or substantially the whole, of the property of his debtor in payment of a past debt, and knowing that there are other creditors, he cannot be said to be acting in good faith."

See also *The Official Assignee of Bombay* v. *Sundarachari* (9).

4. (1924) 29 C W N 374.
7. (1891) L R 19 I A 15 : I L R 19 C 223, at p. 231 (P C).
8. L R (1902) 2 K B 58, at p. 60. 9. (1927) 53 M L J 209.

The Official Assignee of Madras v. Sheak Moideen Bowther.

The onus of proving good faith, it has been held, is on the transferee. *The Official Assignee of Madras* v. *Sambanda Mudaliar* (1) and *The Official Assignee of Bengal* v. *Yokohama Specie Bank, Ltd.* (4). It will depend on the circumstance of each case whether good faith has been proved or not. Having regard to the facts found by us in this case, we are of opinion that the transactions impugned in this case were not executed in good faith and we accordingly allow the appeal and declare that the deed of sale, dated 27th October, 1923, and the deed of transfer, dated 11th November, 1923 (Ex. V), are void against the Official Assignee. The garnishee would be entitled to prove, as a simple creditor, in respect of the amount that he may be found entitled to get from the insolvent. The garnishee should pay the taxed costs on the O.S. scale of the Official Assignee both in the appeal and before the learned Judge including the costs of the commission.

N. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Kokkan Muthiriyan ... *Petitioner** (*Plaintiff*).

v.

K. Rajagopala Aiyangar ... *Respondent* (*Defendant*).

Kokkan Muthiriyan v. Rajagopala Aiyangar.

Damages—Judgment-debtor—Arrest in execution of decree—Damages for—Vakil for decree-holder—Liability of—Receipt of decree amount by Vakil—Failure to report satisfaction—Arrest in consequence of—Vakil telling judgment-debtor to himself go and represent satisfaction to court—Effect.

The Vakil for a decree-holder, to whom money is paid by the judgment-debtor in satisfaction of the decree, is under a legal obligation to report to the court satisfaction of the decree as early as possible. If the Vakil fails to do so, and the judgment-debtor is arrested in consequence, he is liable to the judgment-debtor for damages for failure to report satisfaction and withdraw the warrant. The fact that he told the judgment-debtor that he had no time to go and report satisfaction, and that, therefore, the judgment-debtor himself should go and show the Vakil's receipt to the court and ask the court to refrain from issuing the warrant does not absolve him from liability.

Petition under S. 25 of Act IX of 1887, praying the High Court, to revise the decree of the Small Cause Court Judge, Trichinopoly, dated 7th September, 1925, in S.C.S.No. 5217 of 1924.

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*C R P No. 269 of 1926. 29th March, 1927.

1. (1920) I L R 43 M 739 : 39 M L J 345.

4. (1924) 29 C W N 374.

Kokkan Muthiiyan v. Rajagopala Aiyangar.

The facts of the case are that in execution of a decree awarding costs, the vakil for the decree-holder applied for the issue of a warrant of arrest against the judgment-debtor. Thereupon the judgment-debtor paid the amount of costs into the hands of the decree-holder's vakil who told the judgment-debtor that he, the vakil, had no time to report satisfaction to the court and that the judgment-debtor should himself show the receipt given by the vakil to the court and ask the court to refrain from issuing a warrant of arrest. But a warrant of arrest was issued by the court and the judgment-debtor was arrested in execution thereof. The judgment-debtor thereupon instituted a suit in the Small Cause Court against the decree-holder's vakil for damages for failure to report satisfaction and withdraw the warrant. The Court of Small Causes dismissed the suit and the revision petition was filed against this dismissal.

K. V. Sesha Aiyangar for petitioner.

N. S. Rangaswami Aiyangar for respondent.

The Court delivered the following

JUDGMENT :—Taking the facts to be that, when the plaintiff paid the costs to the defendant, the defendant received them and told the plaintiff that he had no time to go and report satisfaction and, therefore, he must go and show the receipt to the Court and ask the Court to refrain from issuing the warrant of arrest, I am unable to subscribe to the opinion of the lower court that a contractual obligation was thereby created which absolved the defendant from performing the legal duty which the Civil Procedure Code lays on him under O. 21, R. 2. A vakil cannot evade the duties that rule lays on him by pleading that he told the judgment-debtor to go and report the matter on his own account. On the other hand, if plaintiff had taken the receipt to the Court, the Court might have withdrawn the order of arrest, and thus the damages would have been reduced to a negligible amount.

I am surprised that it is argued before me that the defendant had no obligation to report to the Court satisfaction of the decree as early as possible, and thus prevent, if possible, the issue of the warrant of arrest. This view of the defendant requires correction. I think it is sufficient if I direct the respondent to pay the costs of the petitioner here and in the lower court. I reverse the decree of the lower court and decree accordingly.

A. S. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON.

Meenakshi Ammal ... *Petitioner** (*Counter-petitioner*).

v.

Iswaram Aiyar ... *Respondent* (*Petitioner*).

Meenakshi Ammal v. Iswaram Aiyar

Civil Procedure Code, O. 21, R 58 and S. 115—Question of possession not decided—Interference in revision.

In a claim petition under O. 21, R. 58, Civil Procedure Code, the lower Court found that the claimant's *prima facie* title was proved without deciding the question of possession and allowed the claim. In the revision preferred against the said order the respondent raised a preliminary objection that the High Court should not interfere in revision under S. 115 when another remedy was available.

Held, that the High Court could interfere if the lower court had entirely misconceived the question before it or committed such obvious irregularity as in this case where it had not addressed its mind at all to the question of possession which was the question to be decided. In these circumstances the lower court's order could be reversed.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Ambasamudram, dated 19th March, 1925, in C. M. P. No. 253 of 1925 in S. C. S. No. 505 of 1919 on the file of the Court of the Subordinate Judge of Tinnevelly.

E. Krishna Aiyar for petitioner.

K. S. Ramabadra Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The petitioner seeks to set aside the order of the District Munsif of Ambasumudram in C. M. P. No. 253 of 1925 allowing a claim in S. C. S. No. 505 of 1919 on the file of the Tinnevelly Sub Court. A preliminary point has been taken that this court cannot interfere by way of revision. I have already discussed the authorities on this question in *Veerasami Mudali* v. *Venkatachala Mudali* (1). I think the rule is that this Court will not do anything like going into the merits when an appeal is available to the party, but if the lower court whose order is impugned has entirely misconceived the question before it or committed such obvious irregularity, there is no reason why this court should not interfere. In the very short order written by the learned District Munsif in this case

* C R P No. 910 of 1925. 23rd March, 1927.

1. (1925) 50 M L J 102.

Meenakshi Ammal v. Iswaram Aiyar

he finds that the claimant's *prima facie* title is proved, and evidently he has not addressed his mind at all to the question of possession which is the question to be decided in this connection. In these circumstances the order is set aside and the petition referred to the District Munsif for disposal according to law.

Costs of this petition will be costs in the proceedings.

A.S.V. *Order set aside.*

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"RAILWAY PLANT AND ROLLING-STOCK.

63 RAILWAY MATERIALS for permanent-way and rolling-stock, namely, sleepers, other than iron and steel, and fastenings therefor: bearing plates, fish bolts and nuts, chairs, interlocking apparatus, brake gear shunting skids, couplings and springs, signals, turn-tables, weighbridges, carriages, wagons, traversers rail removers, scooters, trollies, trucks and component parts thereof; switches, crossings and the like materials made of alloy steel; also cranes, water-cranes and water-tank when imported by or under the orders of a railway company.

Provided that for the purpose of this entry 'railway' means a line of railway subject to the provisions of the Indian Railways Act, 1890, and includes a railway constructed in a State in India and also such tramways as the Governor-General in Council may, by notification in the *Gazette of India*, specificaly include therein:

Provided also that nothing shall be deemed to be dutiable hereunder which is dutiable under No 51 or No. 51A".

5. In item No. 87, before the word "tramcars" the words "CONVEYANCES not specified in No. 142, namely," shall be inserted.

6. After Part VI the following Part shall be inserted, namely:—

"PART VII.

Articles which are liable to protective duty at special rates.

No.	Name of Article.	Rate of duty.
	CONVEYANCES.	
142 ..	COAL TUBS, tipping wagons and the like conveyances designed for use on light rail track, if adapted to be worked by manual or animal labour and if made mainly of iron or steel; and component [illegible]ereof made of iron or steel—	..
	[illegible] British manufacture ..	Rs. 21 per ton or 17 per cent *ad valorem*, whichever is higher.
	[illegible] of British manufacture ..	Rs. 21 per ton or 17 per cent. *ad valorem*, whichever is higher, *plus* Rs. 15 per ton.
	METALS—IRON AND STEEL.	
143 ..	IRON angle, channel and tee—	
	(*a*) fabricated, all qualities—	
	(i) of British manufacture	Rs. 21 per ton or 17 per cent. *ad valorem*, whichever is higher.
	(ii) not of British manufacture	Rs. 21 per ton or 17 per cent *ad valorem*, whichever is higher *plus* Rs. 15 per ton.
	(*b*) not fabricated, kinds other than galvanized, tinned or lead-coated and other than crown or superior qualities—	
	(i) of British manufacture ..	Rs. 19 per ton.
	(ii) not of British manufacture ..	Rs. 30 per ton.
144 ..	IRON, COMMON BAR not galvanized, tinned or lead-coated if not of any shape and dimension specified in clause (*a*) or clause (*c*) of No. 62.	
	(i) of British manufacture ..	Rs. 26 per ton.
	(ii) not of British manufacture ..	Rs. 37 per ton.
145 ..	IRON OR STEEL NAILS, wire or French ..	Rs. 3 per cwt.
146 ..	IRON OR STEEL PIPES and tubes and fittings therefor, if rivetted or otherwise built up of plates or sheets—	

No.	Name of Article.	Rate of duty.
	(a) galvanized ..	Rs. 33 per ton or 17 per cent. *ad valorem*, whichever is higher.
	(b) not galvanized—	
	(i) not under ⅛ inch thick—	
	of British manufacture ..	Rs. 21 per ton or 17 per cent. *ad valorem*, whichever is higher.
	not of British manufacture ..	Rs. 21 per ton or 17 per cent. *ad valorem*, whichever is higher, *plus* Rs. 15 per ton.
	(ii) Under ⅛ inch thick—	
	of British manufacture ..	Rs. 39 per ton or 17 per cent. *ad valorem*, whichever is higher.
	not of British manufacture ..	Rs. 39 per ton or 17 per cent. *ad valorem*, whichever is higher, *plus* Rs. 26 per ton.
147 ..	IRON OR STEEL plates or sheets (including cuttings, discs and circles) not under ⅛ inch thick and not of cast iron—	
	(a) fabricated, all qualities—	
	(i) of British manufacture ..	Rs. 21 per ton or 17 per cent. *ad valorem*, whichever is higher.
	(ii) not of British manufacture ..	Rs. 21 per ton or 17 per cent. *ad valorem*, whichever is higher, *plus* Rs. 15 per ton.
	(b) not fabricated, chequered and ship, tank, bridge and common qualities—	
	(i) of British manufacture ..	Rs [illegible]
	(ii) not of British manufacture ..	Rs [illegible]
148 ..	IRON OR STEEL sheets (including cuttings, discs and circles) under ⅛ inch thick—	
	(a) fabricated—	
	(i) galvanized ..	Rs. 33 per ton or 17 per cent. *ad valorem*, whichever is higher.
	(ii) all other sorts not otherwise specified (*see* No. 61)—	
	of British manufacture ..	Rs. 39 per ton or 17 per cent. *ad valorem*, whichever is higher.
	not of British manufacture ..	Rs. 39 per ton or 17 per cent. *ad valorem*, whichever is higher, *plus* Rs. 26 per ton.
	(b) not fabricated—	
	(i) galvanized ..	Rs. 30 per ton.
	(ii) all other sorts not otherwise specified (*see* Nos. 61 and 154)—	
	of British manufacture ..	Rs. 35 per ton.
	not of British manufacture ..	Rs. 59 per ton.
149 ..	IRON OR STEEL WIRE, other than barbed or stranded fencing wire, wire-rope or wire-netting ..	Rs. 60 per ton.
149A..	IRON OR STEEL, the original material (but not including machinery, *see* Nos. 51 and 51A) of any ship or other vessel intended for inland or harbour navigation which has been assembled abroad,	Rs. 23 per ton or 10 per cent. *ad valorem*, whichever is higher.

No.	Name of Article.	Rate of duty.
	taken to pieces and shipped for re-assembly in India ..	
	Provided that articles dutiable under this item shall not be deemed to be dutiable under any other item ..	
150 ..	IRON OR STEEL RAILWAY TRACK MATERIAL—	
	A. Rails (including tramway rails the heads of which are not grooved)—	
	(*a*) (i) 30 lbs. per yard and over ..	Rs 13 per ton.
	(ii) fish-plates therefor ..	Rs. 6 per ton or 10 per cent. *ad valorem*, whichever is higher.
	(iii) spikes and tie-bars therefor—	
	of British manufacture ..	Rs. 26 per ton.
	not of British manufacture ..	Rs. 37 per ton.
	(*b*) under 30 lbs. per yard, and fish-plates, spikes and tie-bars therefor—	
	if of British manufacture ..	Rs. 26 per ton.
	if not of British manufacture ..	Rs. 37 per ton.
	B. Switches and crossings and the like materials not made of alloy steel, including switches and crossings and the like materials for tramway rails the the heads of which are not grooved—	
	(i) for rails 30 lbs. per yard and over ..	Rs. 14 per ton or 17 per cent. *ad valorem*, whichever is higher.
	(ii) for rails under 30 lbs. per yard— of British manufacture ..	Rs. 29 per ton or 17 per cent. *ad valorem*, whichever is higher.
	not of British manufacture ..	Rs. 29 per ton or 17 per cent. *ad valorem*, whichever is higher, *plus* Rs. 12 per ton.
	C. Sleepers, other than cast iron, and keys and distance pieces and the like for use with such sleepers. ..	Rs. 10 per ton or 10 per cent. *ad valorem*, whichever is higher.
151 ..	STEEL, angle and tee, not otherwise specified (*see* No. 62) and beam, channel, zed, trough and piling—	
	(*a*) fabricated—	
	(i) of British manufacture ..	Rs. 21 per ton or 17 per cent. *ad valorem*, whichever is higher.
	(ii) not of British manufacture ..	Rs. 21 per ton or 17 per cent. *ad valorem*, whichever is higher, *plus* Rs. 15 per ton.
	(*b*) not fabricated—	
	(i) of British manufacture ..	Rs. 19 per ton.
	(ii) not of British manufacture ..	Rs. 30 per ton.
152 ..	STEEL, bar and rod, not otherwise specified (*see* No. 62)—	
	(i) of British manufacture ..	Rs. 26 per ton.
	(ii) not of British manufacture ..	Rs. 37 per ton.
153 ..	STEEL STRUCTURES, fabricated partially or wholly, not otherwise specified, if made mainly or wholly of steel bars, sections, plates or sheets, for the construction of buildings, bridges, tanks, wellcurbs, trestles, towers and similar structures or for parts thereof, but not including builders' hardware (*see* No.	

No.	Name of Article.	Rate of duty.
	90) or any of the articles specified in Nos. 51, 51A, 64 or 87—	
	(i) of British manufacture ..	Rs. 21 per ton or 17 per cent. *ad valorem*, whichever is higher.
	(ii) not of British manufacture ..	Rs. 21 per ton or 17 per cent *ad valorem*, whichever is higher, *plus* Rs. 15 per ton.
154 ..	STEEL, tinplates and tinned sheets, including tin taggers and cuttings of such plates, sheets or taggers ..	Rs. 48 per ton."

THE CURRENCY ACT, 1927.

ACT NO. IV OF 1927.

[26th March, 1927.]

An Act further to amend the Indian Coinage Act, 1906, and the Indian Paper Currency Act, 1923, for certain purposes, and to lay upon the Governor-General in Council certain obligations in regard to the purchase of gold and the sale of gold or sterling.

Whereas it is expedient further to amend the Indian Coinage Act, 1906, and the Indian Paper Currency Act, 1923, for certain purposes, and to lay upon the Governor-General in Council certain obligations in regard to the purchase of gold and the sale of gold or sterling; It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called the Currency Act, 1927.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) It shall come into force on the 1st day of April 1927.

Amendment of Act III of 1906.

2. In the Indian Coinage Act, 1906,—

(*a*) for section 11 the following section shall be substituted, namely:—

Demonetisation of sovereign and half-sovereign.

"11. Gold coins, whether coined at His Majesty's Royal Mint or at any Mint established in pursuance of a proclamation of His Majesty as a branch of His Majesty's Royal Mint, shall not be legal tender in British India in payment or on account, but such coins shall be received at any Government currency office and, at any time after the 30th day of September, 1927, at any Government Treasury other than a Sub-Treasury, at the bullion value of such coins calcuclated at the rate of 8.47512 grains troy of fine gold per rupee"; and

(*b*) the word "and" at the end of clause (*d*) of sub-section (2) of section 21 and clause (*e*) of that sub-section shall be omitted.

Amendment Act X of 1923.

3. In the Indian Paper Currency Act, 1923,—

(a) to section 2 after the words "in this behalf" the following shall be added, namely:—

"and

'gold bullion' includes gold coin";

(b) in clause (a) of S. 11, the words "or in gold coin which is legal tender under the Indian Coinage Act, 1906," shall be omitted;

(c) in section 13—

(i) the words "for gold coin which is not legal tender under the Indian Coinage Act, 1906, or" shall be omitted; and

(ii) for the figures "11.30016" the figures "8.47512" shall be substituted;

(d) in section 18—

(i) in sub-section (4), the words "sovereigns, half-sovereigns" and the words "coin and" shall be omitted; and

(ii) in clause (a) of sub-section (8), for the figures "11.30016" the figures "8.47512" shall be substituted;

(e) in section 19—

(i) in sub-section (3), the words "sovereigns, half-sovereigns" shall be omitted, and, in the *Explanation*, after the word "sub-section", the following words and figures shall be inserted, namely:—

"gold bullion shall be reckoned at the rate of one rupee for 8.47512 grains troy of fine gold, and"; and

(ii) in sub-section (5), the words "coin or" and the word "coin", where it occurs for the second time, shall be omitted.

Obligation upon Government to purchase gold bullion tendered for sale.

4. Any person who offers for sale to the Governor General in Council at the office of the Master of the Mint, Bombay, or at any other place notified in this behalf by the Governor General in Council in the *Gazette of India*, gold in the form of bars containing not less than forty tolas of fine gold shall, subject to such conditions as the Governor General in Council may, by notification in the *Gazette of India*, prescribe, be entitled to receive payment for the same at the rate of twenty-one rupees, three annas and ten pies per tola of fine gold.

Obligation upon Government to sell gold or sterling.

5. (1) The Governor General in Council shall sell, to any person who makes a demand in that behalf at the office of the Controller of the Currency, Calcutta, or of the Deputy Controller of the Currency, Bombay, and pays the purchase price in legal tender currency, gold for delivery at the Bombay Mint at the rate of twenty-one rupees, three annas and ten pies per tola of fine gold or, at the option of the Controller or the Deputy Controller, as the case may be, sterling for immediate delivery in London at an equivalent rate:

Provided that no person shall be entitled to demand an amount of gold or sterling of less value than that of 1,065 tolas of fine gold,

(2) For the purpose of determining the equivalent rate applicable to the sale of sterling under this section, twenty-one rupees, three annas and ten pies shall be deemed to be equivalent to such sum in sterling as is required to purchase one tola of fine gold in London at the rate at which the Bank of England is bound by law to give sterling in exchange for gold, after deduction therefrom of an amount representing the normal cost per tola of transferring gold bullion in bulk from Bombay to London, including interest on its value during transit.

(3) The Governor General in Council shall, from time to time, determine the equivalent rate in accordance with the provisions of sub-section (2), and shall notify the rate so determined in the *Gazette of India.*

THE INDIAN FINANCE ACT, 1927.

ACT NO. V OF 1927.

[30th March, 1927.]

An Act to fix the duty on salt manufactured in or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, *further to amend the Indian Tariff Act,* 1894, *the Indian Stamp Act,* 1899, *and the Indian Paper Currency Act,* 1923, *and to fix rates of income-tax.*

Whereas it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India to fix maximum rates of postage under the Indian Post Office Act, 1898, further to amend the Indian Tariff Act, 1894, the Indian Stamp Act, 1899, and the Indian Paper Currency Act, 1923, and to fix rates of income-tax; It is hereby enacted as follows:—

Short title, extent and duration.

1. (1) This Act may be called the Indian Finance Act, 1927.

(2) It extends to the whole of British India, including British Baluchistan and the Sonthal Parganas.

(3) Sections 2 and 3 shall remain in force only up to the 31st day of March, 1928.

Fixation of salt duty.

2. The provisions of S. 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Governor General in Council to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India other than Burma and Aden, be construed as if, with effect from the 1st day of April 1927, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two sevenths pounds avoirdupois of salt manufactured in or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

3. With effect from the 1st day of April 1927, the schedule contained in the First Schedule to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act. Postal rates

4. With effect from the 1st day of March 1927, the following amendments shall be made in the Indian Tariff Act, 1894, namely:— Amendment of Act VIII of 1894.

(1) In the Second Schedule to that Act there shall be made the amendments specified in Part I of the Second Schedule to this Act.

(2) In the Third Schedule to that Act there shall be made the amendment specified in Part II of the Second Schedule to this Act.

5. With effect from the 1st day of July 1927, the following amendments shall be made in the Indian Stamp Act, 1899, namely:— Amendment of Act II of 1899.

(1) In section 3—

(*a*) in clause (*b*), the word "cheque" shall be omitted, and after the words "bill of exchange" the words "payable otherwise than on demand" shall be inserted; and

(*b*) in clause (*c*), the word "cheque" shall be omitted.

(2) In clause (*b*) of section 11, the word "cheques" shall be omitted.

(3) In sub-section (1) of section 18, the word "cheque" shall be omitted.

(4) In section 19, after the words "bill of exhhange", where they first occur, the words "payable otherwise than on demand" shall be inserted and the word "cheque", in both places where it occurs, shall be omitted.

(5) In section 47, for the words "promissory note or cheque" the words "or promissory note" shall be substituted, and for the words "note or cheque", wherever they occur thereafter, the words "or note" shall be substituted.

(6) In clause (*c*) of section 49—

(a) the word "cheques" shall be omitted, and after the words "bills of exchange" the words "payable otherwise than on demand" shall be inserted;

(b) the words "or cheque", wherever they occur, shall be omitted;

(c) the word "cheque", wherever it occurs elsewhere, shall be omitted; and

(*d*) for the words "any bill of exchange", where they occur for the first time in sub-clauses (1) and (3), the words "any such bill of exchange" shall be substituted.

(7) In clause (*a*) of sub-section (1) of section 62, the word "cheque" shall be omitted, and after the words "bill of exchange" the words "payable otherwise than on demand" shall be inserted.

(8) In section 67, after the words "bill of exchange" the words "payable otherwise than on demand" shall be inserted.

(9) In article No. 13 of Schedule I, the word, figure and brackets "and (3)" shall be omitted, and the letter, brackets and words "(a) where payable on demand", together with the entry "one anna" in the second column against those words, shall be omitted.

(10) Article No. 21 of Schedule I shall be omitted.

Amendment of Act X of 1923.

6. In sub section (7) of section 19 of the Indian Paper Currency Act, 1923, for the figures "1927" the figures "1928" shall be substituted.

Income-tax and super-tax

7. (1) Income-tax for the year beginning on the 1st day of April 1927, shall be charged at the rates specified in Part I of the Third Schedule.

(2) The rates of super-tax for the year beginning on the 1st day of April 1927, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be those specified in Part II of the Third Schedule.

(3) For the purposes of the Third Schedule, "total income" means total income as determined, for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

SCHEDULE I.

SCHEDULE TO BE INSERTED IN THE INDIAN POST OFFICE ACT, 1898.

[*See section* 3.]

"THE FIRST SCHEDULE.

INDIAN POSTAGE RATES

[*See section* 7.]

Letters.

For a weight not exceeding two and a half tolas ..	One anna.
For every two and a half tolas, or fraction thereof, exceeding two and a half tolas	One anna.

Post cards.

Single	Half an anna.
Reply	One anna.

Book, Pattern and Sample Packets.

For every five tolas or fraction thereof .. .	Half an anna.

Registered Newspapers.

For a weight not exceeding eight tolas	Quarter of an anna.
For a weight exceeding eight tolas and not exceeding twenty tolas. ..	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas. ..	Half an anna.

Parcels.

For a weight not exceeding twenty tolas	Two annas.
For a weight exceeding twenty tolas and not exceeding forty tolas. ..	Four annas.
For every forty tolas, or fraction thereof, exceeding forty tolas. ..	Four annas.

SCHEDULE II.

[*See Section* 4.]

PART I.

AMENDMENTS TO THE SECOND SCHEDULE TO THE INDIAN TARIFF ACT, 1894.

(1) (*a*) For Item No. 10-A, the following Item shall be substituted, namely :—

"10-A—RUBBER STUMPS, rubber seeds and raw rubber."

(*b*) In Item No. 76, for the words "excluding oil-seeds imported into British India by sea from the territories of any Prince or Chief in India (*see* No. 6)" the words "not otherwise specified" shall be substituted.

(2) For Item No. 36, the following item shall be substituted, namely :—

				RS. A.
"36	TOBACCO, unmanufactured	Pound.		1 8"

(3) (*a*) After Item No. 42, the following heading and item shall be inserted, namely :—

"CARRIAGES AND CARTS.

42-A.	MOTOR CARS, motor cycles, and motor scooters, and articles (other than rubber tyres and tubes) adapted for use as parts and accessories thereof : provided that such articles as are ordinarily also used for other purposes than as parts and accessories of motor vehicles included in this item or in No. 87 shall be dutiable at the rate of duty specified for such articles.	*Ad valorem.*	20 per cent."

(*b*) In Item No. 87, for the figures "127" the figures and letter "42-A" shall be substituted.

(*c*) In Item No. 115, for the words and figures "Nos. 53 and 139" the word and figures "No. 53" shall be substituted.

(*d*) Items Nos. 127 and 139 shall be omitted.

PART II.

AMENDMENT TO THE THIRD SCHEDULE TO THE INDIAN TARIFF ACT, 1894.

Item No. 5 and the heading thereto shall be omitted.

SCHEDULE III.

[*See Section* 7.]

PART I.

RATES OF INCOME-TAX.

	Rate.
A. In the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(1) When the total income is less than Rs. 2,000 ..	*Nil.*
(2) When the total income is Rs. 2,000 or upwards, but is less than Rs. 5,000.	Five pies in the rupee.
(3) When the total income is Rs. 5,000 or upwards, but is less than Rs. 10,000.	Six pies in the rupee.
(4) When the total income is Rs. 10,000 or upwards, but is less than Rs. 20,000.	Nine pies in the rupee.
(5) When the total income is Rs. 20,000 or upwards, but is less than Rs. 30,000.	One anna in the rupee.
(6) When the total income is Rs. 30,000 or upwards, but is less than Rs. 40,000.	One anna and three pies in the rupee.
(7) When the total income is Rs. 40,000 or upwards.	One anna and six pies in the rupee.
B. In the case of every company and registered firm, whatever its total income.	One anna and six pies in the rupee.

PART II.

RATES OF SUPER-TAX.

	Rate.
In respect of the excess over fifty thousand rupees of total income :—	
(1) in the case of every company	One anna in the rupee.
(2) (a) in the case of every Hindu undivided family—	
(i) in respect of the first twenty-five thousand rupees of the excess.	*Nil.*
(ii) for every rupee of the next twenty-five thousand rupees of such excess	One anna in the rupee.
(b) in the case of every individual, unregistered firm and other association of individuals not being a registered firm or a company, for every rupee of the first fifty thousand rupees of such excess.	One anna in the rupee.
(c) in the case of every individual, Hindu undivided family, unregistered firm and other association of individuals not being a registered firm or a company—	
(i) for every rupee of the second fifty thousand rupees of such excess.	One anna a half annas in the rupee.
(ii) for every rupee of the next fifty thousand rupees of such excess.	Two annas in the rupee.
(iii) for every rupee of the next fifty thousand rupees of such excess	Two and a half annas in the rupee.
(iv) for every rupee of the next fifty thousand rupees of such excess.	Three annas in the rupee
(v) for every rupee of the next fifty thousand rupees of such excess.	Three and a half annas in the rupee.
(vi) for every rupee of the next fifty thousand rupees of such excess.	Four annas in the rupee.
(vii) for every rupee of the next fifty thousand rupees of such excess.	Four and a half annas in the rupee.
(viii) for every rupee of the next fifty thousand rupees of such excess.	Five annas in the rupee.
(ix) for every rupee of the next fifty thousand rupees of such excess.	Five and a half annas in the rupee.
(x) for every rupee of the remainder of the excess.	Six annas in the rupee.

THE MADRAS SALT (AMENDMENT) ACT, 1927.

ACT NO. VI OF 1927.

[3rd April, 1927 and 16th April, 1927.

An Act further to amend the Madras Salt Act, 1889, for a certain purpose.

WHEREAS it is expedient further to amend the Madras Salt Act, 1889, for the purpose hereinafter appearing : it is hereby enacted as follows :—

Short title.

1. This Act may be called THE MADRAS SALT (AMENDMENT) ACT, 1927.

Amendment of section 43, Madras Act IV of 1889.

2. In sub-clause (4) of Clause B of S. 43 of the Madras Salt Act, 1889, for the words " five per centum " the words " such percentage as the Central Board of Revenue may fix " shall be substituted.

THE PROVIDENT FUNDS (AMENDMENT) ACT, 1927.

ACT NO. VII OF 1927.

[3rd April, 1927 and 16th April, 1927.

An Act further to amend the Provident Funds Act, 1925, for a certain purpose.

WHEREAS it is expedient further to amend the Provident Funds Act, 1925, for the purpose hereinafter appearing ; it is hereby enacted as follows :—

Short title.

1. This Act may be called THE PROVIDENT FUNDS (AMENDMENT) ACT, 1927.

Amendment of section 2, Act XIX of 1925.

2. In clause (*d*) of section 2 of the Provident Funds Act, 1925, for the words "for teachers in educational institutions" the following words shall be substituted, namely :—

"Of persons employed in educational institutions or employed by bodies existing solely for educational purposes."

THE SEA CUSTOMS (AMENDMENT) ACT, 1927.

ACT NO. VIII OF 1927.

[3rd April, 1927 and 16th April, 1927.

An Act further to amend the Sea Customs Act, 1878, for a certain purpose.

WHEREAS it is expedient further to amend the Sea Customs Act, 1878, for the purpose hereinafter appearing; it is hereby enacted as follows : —

Short title.

1. This Act may be called THE SEA CUSTOMS (AMENDMENT) ACT, 1927.

Insertion of new section 34-A in Act VIII of 1878.

2. After section 34 of the Sea Customs Act, 1878 (hereinafter referred to as the said Act), the following section shall be inserted, namely :—

Abatement of duty on goods on which duty is levied on quantity.

"34-A. Where the Customs-collector is satisfied that any goods on which duties are levied on quantity and not on value, and which are of a kind to which the Governor-General in Council has, by notification in the Gazette of India, declared that the provisions of this section shall apply, have before delivery of the bill of entry deteriorated to the extent of more than one-tenth of their value, he may allow an abatement of duty proportionate to the extent of such deterioration."

Amendment of section 35, Act VIII of 1878.

3. In section 35 of the said Act, for the word "damage" the words "any deterioration" shall be substituted, and after the words "beer, or" the words "save as provided by section 34-A" shall be inserted.

INDIAN LIMITATION (SECOND AMENDMENT) ACT, 1927.

ACT NO. IX OF 1927.

[3rd April, 1927 and 16th April, 1927.

An Act further to amend the Indian Limitation Act, 1908, for a certain purpose.

WHEREAS it is expedient further to amend the Indian Limitation Act, 1908, for the purpose hereinafter appearing; it is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN LIMITATION (SECOND AMENDMENT) ACT, 1927.

(2) It shall come into force on the 1st day of January, 1928.

Amendment of Article 182, Schedule I, Act IX of 1908.

2. In the Third Division of the First Schedule to the Indian Limitation Act, 1908, in Article No. 182—

(*a*) in clause 5 of the entry in the third column, for the word "applying" the words "the final order passed on an application made" shall be substituted; and

(*b*) for clause 5 of the same entry the following shall be substituted, namely:—

"6. (in respect of any amount, recovered by execution of the decree or order, which the decree-holder has been directed to refund by a decree passed in a suit for such refund) the date of such last-mentioned decree or, in the case of an appeal therefrom, the date of the final decree of the Appellate Court or of the withdrawal of the appeal."

REPEALING AND AMENDING ACT, 1927.

ACT NO. X OF 1927.

[4th April, 1927.

An Act to amend certain enactments and to repeal certain other enactments.

WHEREAS it is expedient that certain amendments should be made in the enactments specified in the First Schedule;

AND WHEREAS it is also expedient that certain enactments specified in the Second Schedule which are spent or have otherwise become unnecessary, or have ceased to be in force otherwise than by expressed specific repeal, should be expressly and specifically repealed; it is hereby enacted as follows:—

Short title.

1. This Act may be called THE REPEALING AND AMENDING ACT, 1927.

Amendment of certain enactments.

2. The enactments specified in the First Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

Repeal of certain enactments.

3. The enactment specified in the Second Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

Savings.

4. The repeal by this Act of any enactment shall not affect any Act or regulation in which such enactment has been applied, incorporated or referred to;

And this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing ;

nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed ;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force.

THE INSOLVENCY (AMENDMENT) ACT, 1927.

ACT NO. XI OF 1927.

[2nd September, 1927.

An Act further to amend the Presidency-towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920, for certain purposes.

WHEREAS it is expedient further to amend the Presidency-towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1920, for certain purposes hereinafter appearing ; it is hereby enacted as follows :—

Short title.

1. This Act may be called THE INSOLVENCY (AMENDMENT) ACT, 1927.

Amendment of section 14, Act III of 1909.

2. Section 14 of the Presidency-towns Insolvency Act, 1909, shall be re-numbered as sub-section (1) of section 14, and to that section the following sub-section shall be added, namely :—

"(2) A debtor in respect of whom an order of adjudication, whether made under this Act or under the Provincial Insolvency Act, 1920, has been annulled owing to his failure to apply or to prosecute an application for his discharge shall not be entitled to present an insolvency petition without the leave of the Court by which the order of adjudication was annulled. Such Court shall not grant leave unless it is satisfied either that the debtor was prevented by any reasonable cause from presenting or prosecuting his application, as the case may be, or that the petition is founded on facts substantially different from those contained in the petition on which the order of adjudication was made."

Amendment of section 21, Act III of 1909.

3. In sub-section (1) of section 21 of the same Act, after the words "annul the adjudication" the following words shall be added, namely :—

"and the Court may, of its own motion or on application made by the official assignee or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 14, not entitled to present such petition."

Amendment of section 10, Act V of 1920.

4. In sub-section (2) of section 10 of the Provincial Insolvency Act, 1920, for the words "made under this Act" the words "whether made under the Presidency-towns Insolvency Act, 1909, or under this Act" shall be substituted.

Amendment of section 35, Act V of 1920.

5. In section 35 of the same Act, after the words "annul the adjudication" the following words shall be added, namely :—

"and the Court may, of its own motion or on application made by the receiver or any creditor, annul any adjudication made on the petition of a debtor who was, by reason of the provisions of sub-section (2) of section 10, not entitled to present such petition."

THE REPEALING ACT, 1927.

ACT NO. XII OF 1927.

[*8th September, 1927.*

An Act to repeal certain enactments.

WHEREAS it is expedient that certain enactments specified in the Schedule which are spent or have otherwise become unnecessary, or have ceased to be in force otherwise than by express specific repeal, should be expressly and specifically repealed ; it is hereby enacted as follows :—

Short title.

1. This Act may be called THE REPEALING ACT, 1927.

Repeal of certain enactments.

2. The enactments specified in the Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

Savings.

3. The repeal by this Act of any enactment shall not affect any Act or Regulation in which such enactment has been applied, incorporated or referred to ;

and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered, or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand, or any indemnity already granted, or the proof of any past act or thing ;

nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office, or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed ;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force.

THE SCHEDULE.

(*See Section 2.*)

Year.	No.	Short title.	Extent of Repeal.	Explanation.
		Acts of the Governor General in Council.		
1871	XXIII	The Pensions Act, 1871 ..	So much of the Schedule as relates to Bengal Regulation I of 1804.	Bengal Regulation I of 1804 was totally repealed by Act XXIX of 1871.
1872	I	The Indian Evidence Act, 1872.	So much of the Schedule as relates to Acts— XV of 1852 XIX of 1853 II of 1855 XXV of 1861.	These Acts have been repealed.
1874	XIV	The Scheduled Districts Act, 1874.	All entries in the Second Schedule except those relating to Act XXXVII of 1855 and Act X of 1857.	The Scheduled Districts Act, 1874, has not been brought into force in the Sonthal Parganas where Act XXXVII of 1855 and Act X of 1857 are still in force. Section 2 and the Second Schedule of the Scheduled Districts Act are spent except as regards these two Acts only. This necessitates the retention of section 2 and the Second Schedule in the form proposed.
1874	XV	The Laws Local Extent Act, 1874.	So much of the First Schedule as relates to Acts— XXVI of 1836 .. XIX of 1841 .. XX of 1847 .. XXX of 1852 .. VI of 1864 .. XXI of 1865 .. V of 1866 .. XV of 1869 .. I of 1870 ..	These Acts have been repealed.
			So much of the Second Schedule as relates to Acts— IX of 1846 .. XXI of 1855 .. VIII of 1856 .. XXVII of 1860, and to	Do.

Year.	No.	Short title	Extent of Repeal.	Explanation.
		Acts of the Governor General in Council—contd.		
1874	XV	The Laws Local Extent Act, 1874.	Madras Regulation V of 1816.	This Regulation has been repealed.
			In the Third Schedule, in the entry against Bombay Regulation II of 1827 the words "sections 47 to 54 (inclusive) and section 56 (pleaders)."	These sections have been repealed.
1882	XV	The Presidency Small Cause Court Act, 1882.	So much of the First Schedule as relates to Act X of 1877.	Act X of 1877 has been repealed
1891	XII	The Amending Act, 1891 ..	So much of the Second Schedule as relates to Acts— I of 1859 .. X of 1865 .. V of 1881 .. XIV of 1883 ..	These Acts have been repealed.
1897	V	The Amending Act, 1897 ..	So much of the Third Schedule as relates to Acts— XXXII of 1850, and XIX of 1871.	Do.
1897	XIV	The Indian Short Titles Act, 1897.	So much of the Schedule as relates to Acts— XIX of 1841 .. XXVII of 1841 .. XX of 1847 .. XXVII of 1857 .. XXXIV of 1858 .. XXXV of 1858 .. XXXVI of 1858 .. XLVII of 1860 .. XVI of 1864 .. XVII of 1864 .. XXI of 1864 .. I of 1870 .. II of 1877 .. I of 1884 .. XV of 1885 .. XVIII of 1886 .. VI of 1887 .. X of 1888 .. II of 1890 .. XIX of 1890 .. VII of 1894 .. III of 1896 .. VII of 1896 ..	Do.
1898	XIII	The Burma Laws Act, 1898	In sub-section (1) of section 1, the word "and" and sub-section (2) of the same section.	Commencement clause. Spent.
			So much of the First Schedule as relates to Acts— XX of 1847 .. XXX of 1852 .. XXXV of 1858 ..	These Acts have been repealed.

Year.	No.	Short title.	Extent of Repeal.	Explanation.
			Acts of the Governor General in Council—contd.	
1898	XIII	The Burma Laws Act, 1898	So much of the First Schedule as relates to Acts—	
			XXXVI of 1858 ..	These Acts have been repealed.
			XVI of 1863 ..	
			VI of 1864 ..	
			X of 1865 ..	
			XXI of 1865 ..	
			III of 1867 ..	
			V of 1869 ..	
			XV of 1869 ..	
			XX of 1869 ..	
			XXIII of 1870 ..	
			II of 1874 ..	
			V of 1875 ..	
			XI of 1876 ..	
			II or 1877 ..	
			XI of 1877 ..	
			XV of 1877 ..	
			I of 1879 ..	
			III of 1879 ..	
			XI of 1879 ..	
			XX of 1879 ..	
			XXI of 1879 ..	
			V of 1881 ..	
			VI of 1882 ..	
			XII of 1882 ..	
			XIV of 1882 ..	
			XVIII of 1882 ..	
			XX of 1882 ..	
			VI of 1884 ..	
			XVI of 1884 ..	
			II of 1886 ..	
			XII of 1886 ..	
			XIII of 1886 ..	
			XIII of 1887 ..	
			XX of 1887 ..	
			V of 1888 ..	
			VI of 1889 ..	
			XI of 1889 ..	
			XIII of 1889 ..	
			V of 1893 ..	
			IX of 1895 ..	
			XII of 1895 ..	
			XII of 1896 ..	
			IX of 1897 ..	
			XII of 1897 ..	
			II of 1898 ..	
			So much of the Third Schedule as relates to—	
			Act XVIII of 1882 ..	These have been repealed.
			Act XXII of 1883 ..	
			Reg. V of 1887 ..	
			Reg. I of 1896 ..	
			So much of the Fourth Schedule as relates to—	
			Act III of 1892 ..	Do.
			Act XI of 1894 ..	
			Act XVIII of 1896 ..	
			Reg. I of 1891 ..	
			Reg. IV of 1894 ..	

Year.	No.	Short title.	Extent of Repeal.	Explanation.
		Acts of the Governor General in Council—contd.		
1899	XIII	The Glanders and Farcy Act, 1899.	In sub-section (1) of section 2, the words "either generally or in respect of any local area."	These words were virtually repealed by Act XII of 1910.
1901	XI	The Amending Act, 1901 ..	In the First Schedule— In Part I— the entries relating to Madras Regulations VII of 1808 and V of 1816. In Part II— the entries relating to Acts— XXI of 1855 .. XXVII of 1857 .. XXX of 1865 .. In Part III— the entries relating to Madras Act— VIII of 1865 .. V of 1866 .. II of 1871 .. VII of 1871 .. III of 1886 .. III of 1890 .. I of 1892 .. II of 1898 .. I of 1899 .. III of 1900 ..	These Madras Regulations have been repealed. These Acts have been repealed. Do.
1900	X	The Indian Census Act, 1900.	The whole	Spent.
1903	I	The Amending Act, 1903 ..	In Part II of the First Schedule the entry relating to Act VII of 1876	Act VII of 1876 has been repealed.
1910	XVI	The Indian Census Act, 1910.	The whole ..	Spent.
1911	II	The Indian Patents and Designs Act, 1911.	Section 80 ..	Repealing provision. Spent.
1911	VIII	The Indian Army Act, 1911 ..	Section 127 and Schedule ..	Do.
1911	X	The Prevention of Seditious Meetings Act, 1911.	Section 9 ..	Do.
1913	II	The Official Trustees' Act, 1913.	Section 33 and Schedule ..	Do.
1913	III	The Administrator General's Act, 1913.	Section 60 and Schedule ..	Do.
1914	III	The Indian Copyright Act, 1914.	Section 15 and the Second Schedule.	Repeal of prior enactments. Spent
1914	IV	The Decentralization Act, 1914.	In Part I of the Schedule, the entries relating to— Act II of 1896 .. Act VI of 1900 .. Act VIII of 1901 . Act XVI of 1903 ..	These Acts have been repealed.
1914	VIII	The Indian Motor Vehicles Act, 1914.	Section 19 and Schedule ..	Repeal of prior enactments. Spent.

Year.	No.	Short title.	Extent of Repeal.	Explanation.
		Acts of the Governor-General in Council—contd.		
1914	IX	The Local Authorities Loans Act, 1914.	Section 9 and Schedule II ..	Repeal of prior enactments Spent.
1914	X	The Repealing and Amending Act, 1914.	Sections 3 and 4 .. The Second Schedule ..	Repeal of prior enactments and savings. Spent.
1914	XVII	The Second Repealing and Amending Act, 1914.	Sections 3 and 4 .. The Second Schedule ..	Repeal of prior enactments Spent.
1915	I	The Emergency Legislation Continuance Act, 1915.	The whole ..	Expired.
1915	VI	The Indian Patents and Designs (Temporary Rules) Act, 1915.	The whole ..	Expired.
1915	XI	The Repealing and Amending Act, 1915.	Sections 3 and 4 .. The Second Schedule ..	Repeal of prior enactment and savings. Spent.
1915	XIV	The Enemy Trading Act, 1915.	The whole ..	Expired.
1916	III	The Foreigners' (Trial by Court-martial) Act, 1916.	The whole ..	Expired.
1916	IV	The Indian Tariff (Amendment) Act, 1916.	Section 5 and Schedule II ..	Repealing provisions Spent.
1916	X	The Enemy Trading Act, 1916.	The whole ..	Expired.
1916	XI	The Import and Export of Goods Act, 1916.	The whole ..	Expired.
1916	XIV	The Indian Bills of Exchange Act, 1916.	The whole ..	Expired.
1917	I	The Inland Steam Vessels Act, 1917.	Section 75 and Schedule II ..	Repealing provisions Spent.
1917	V	The Destruction of Records Act, 1917.	Section 6 and the Schedule ..	Do.
1917	IX	The Indian Bill of Exchange (Amendment) Act, 1917.	The whole ..	Expired.
1917	XXII	The Gold (Import) Act, 1917..	The whole ..	Expired.
1917	XXIV	The Repealing and Amending Act, 1917.	Sections 3 and 4 .. The Second Schedule ..	Repealing provisions and savings. Spent.
1918	XI	The Indian Army (Amendment) Act, 1918.	Section 26 and the Schedule..	Repealing provisions. Spent.
1918	XIV	The Gold Coinage Act, 1918 ..	The whole ..	Expired.
1918	XV	The Enemy Trading Orders (Validation) Act, 1918.	The whole ..	Expired.

Year.	No.	Short title.	Extent of Repeal.	Explanation.
		Acts of the Governor General in Council—contd.		
1918	XVII	The Indian Non-ferrous Metal Industry Act, 1918.	The whole ..	Expired.
1919	III	The Motor Spirit (Duties) Amendment Act, 1919.	The whole ..	Repealing enactment. Spent.
1919	XII	The Poisons Act 1919 ..	Section 10 ..	Repealing provisions. Spent.
1919	XVIII	The Repealing and Amending Act, 1919.	Sections 13 and 4 and the Second Schedule.	Do.
1920	IV	The Indian Census Act, 1920.	The whole ..	Expired.
1920	V	The Provincial Insolvency Act, 1920.	In section 69, the words "by the Court" where they occur for the second time.	Consequential on the amendment of section 70 by Act IX of 1926.
			In Schedule I, the entry relating to section 69.	Consequential on the amendment of section 70 by Act IX of 1926.
			Sub-section (1) of section 83 and Schedule III.	Repealing provisions. Spent.
1920	X	The Indian Securities Act 1920	Section 25 ..	Do.
1920	XX	The Indian Army (Suspension of Sentences) Act, 1920.	Section 10 ..	Do.
1920	XXVIII	The Indian Patents and Designs (Temporary Rules) Amendment Act, 1920.	The whole ..	Expired.
1920	XXX	The Rouble Note Act, 1920.	The whole ..	Expired.
1920	XXXI	The Repealing and Amending Act, 1920.	Sections 3 and 4 ..	Repealing provisions and savings. Spent
			So much of the First Schedule as relates to Act XVII of 1914.	Due on proposed repeal of Schedule II of Act XVII of 1914.
			The Second Schedule ..	Repealing provisions. Spent.
1920	XXXVI	The Indian Coinage (Amendment) Act, 1920.	The whole ..	This Act has been virtually repealed by S. 2 of Act IV of 1927.

Year	No.	Short title.	Extent of Repeal.	Explanation.
		Acts of the Governor General in Council—concld		
1920	XXXVII	The Indian Army (Amendment) Act, 1920.	Section 10 ..	Repealing provision. Spent.
1920	XXXVIII	The Devolution Act, 1920 ..	In the First Schedule the entries relating to— Act XIII of 1879 .. ,, XIV of 1891 .. ,, II of 1896 .. ,, VI of 1900 .. ,, VIII of 1901 .. ,, XVI of 1903 .. Regulation V of 1892 .. Regulation I of 1896 .. Bengal Act III of 1899 .. U.P. Act II of 1901 .. U.P. Act III of 1906 ..	These have been repealed.
			Section 3 and the Second Schedule.	Repealing provisions. Spent.
1920	XLVII	The Imperial Bank of India Act, 1920.	Section 34 and Schedule III ..	Do.
1920	XLIX	The Auxiliary Force Act, 1920.	Section 36 and Schedule II ..	Do.
		Acts of the Indian Legislature		
1921	IV	The Import and Export of Goods (Amendment) Act, 1921.	The whole ..	Expired.
1921	XI	The Indian Works of Defence (Amendment) Act, 1921.	Section 4 ..	Repealing provisions. Spent.
1921	XVI	The Indian Penal Code (Amendment) Act, 1921.	Section 4 ..	Do.
1921	XVII	The Cattle Trespass (Amendment) Act, 1921.	Section 3 ..	Do.
1922	II	The Indian Factories (Amendment) Act, 1922.	Section 33 and Schedule II .. Sub-section (3) of section 14..	Do. This sub-section is now obsolete.
1922	IV	The Special Laws Repeal Act, 1922.	The whole ..	Spent.
1922	V	The Indian Criminal Law Amendment Repealing Act, 1922.	The whole ..	Repealing measure. Spent.
1922	VII	The Indian Emigration Act, 1922.	Section 33 ..	Repealing provisions Spent.
1922	XI	The Indian Income-tax Act, 1922.	Section 68 and the Schedule ..	Do.
1922	XII	The Indian Finance Act, 1922.	Sub-section (3) of section 1. Sub-section (2) of section 3. Sections 4, 7 and 8. Schedules II and III.	Spent. Repealing and superseded provisions. Spent.
1923	IV	The Indian Mines Act, 1923.	Section 50 and Schedule ..	Repealing provisions. Spent.
1923	V	The Indian Boilers Act, 1923.	Section 35 and Schedule ..	Do.

Year.	No.	Short title.	Extent of Repeal.	Explanation.
		Acts of the Indian Legislature—contd.		
1923	VI	The Cantonments (House Accommodation) Act, 1923.	Section 39 and Schedule ..	Repealing provisions.
1923	XI	The Repealing and Amending Act, 1923.	Sections 3 & 4 and the Second Schedule.	Do.
1923	XII	The Criminal Law Amendment Act, 1923.	Sections 4, 8, 10, 20 and 26 ..	Do.
1923	XVIII	The Code of Criminal Procedure (Amendment) Act, 1923	Sections 129 and 163 ..	Do.
1923	XIX	The Indian Official Secrets Act, 1923.	Section 16 ..	Do.
1923	XXI	The Indian Merchant Shipping Act, 1923.	Section 296 and Schedule V ..	Do.
1923	XXVIII	The Indigo Cess (Repealing) Act, 1923.	The whole ..	Repealing Act. Spent.
1923	XXXVII	The Code of Criminal Procedure (Second Amendment) Act, 1923.	Section 6 ..	Repealing provisions. Spent.
1924	II	The Cantonments Act, 1924 ..	Section 292 and Schedule VI ..	Do.
1924	IV	The Central Board of Revenue Act, 1924.	In the Schedule, the entry relating to Act II of 1896.	This Act (II of 1896) has been repealed.
1924	VI	The Criminal Tribes Act, 1924.	Section 30 and the Second Schedule.	Repealing provisions. Spent.
1924	VII	The Repealing and Amending Act, 1924.	Sections 3 & 4 and the Second Schedule.	Do.
1924	VIII	The Sea-Customs (Amendment) Act, 1924.	The whole ..	Repealing enactment. Spent.
1925	III	The Workmen's Breach of Contract (Repealing) Act, 1925.	The whole ..	Do.
1925	IV	The Indian Soldiers (Litigation) Act, 1925.	Section 15 ..	Do.
1925	XIII	The Indian Finance Act, 1925.	Sub-section (3) of section 1. Sections 2, 4, 6 and 7 .. Schedules II and III ..	Sections 2 and 4 expired and section 6 superseded and section 7 rendered unnecessary.
1925	XIV	The Indian Tariff (Amendment) Act, 1925.	In the Schedule, entries Nos. 12, 13, 14 and 23.	Due on passing of Act III of 1927 which has superseded the items to which these entries relate.
1925	XIX	The Provident Funds Act, 1925	Section 10 and Schedule ..	Repealing provisions. Spent.

Year.	No.	Short title.	Extent of Repeal.	Explanation.
		Acts of the Indian Legislature—contd.		
1925	XXVII	The Opium (Amendment) Act, 1925.	Section 4 ..	Repealing provisions Spent.
1925	XXXVI	The Indian Ports (Amendment) Act, 1925.	Sub-section (2) of section 2 ..	Do.
1925	XXXVII	The Repealing and Amending Act, 1925.	Sections 3 and 4 and the Second Schedule.	Do.
1925	XXXIX	The Indian Succession Act, 1925.	Section 392 and Schedule XI ..	Do.
1926	II	The Code of Criminal Procedure (Amendment) Act, 1926.	Section 2 ..	Do.
1926	IV	The Guardians and Wards (Amendment) Act, 1926.	Sections 4 and 5 ..	Do.
1926	VII	The Indian Naturalization Act, 1926.	Section 15 and Schedule ..	Do.
1926	VIII	The Steel Industry (Amendment) Act, 1926.	The whole ..	The principal Act (XIV of 1924) has been repealed.
1926	XIX	The Indian Finance Act, 1926.	Sub-section (3) of section 1 .. Sections 2 and 4 .. Section 3 .. Section 5 ..	Spent. Expired. Repealing provision. Spent. Superseded by Act V of 1927.
1926	XXI	The Legal Practitioners (Fees) Act, 1926.	Section 6 ..	Repealing provision. Spent.
1926	XXII	The Code of Civil Procedure (Second Amendment) Act, 1926.	Section 3 ..	Do.
1926	XXX	The Negotiable Instruments (Interest) Act, 1926.	Section 3 ..	Do.
1926	XXXIX	The Provincial Insolvency (Amendment) Act, 1926.	Section 7 ..	Do.
1927	III	The Steel Industry (Protection) Act, 1927.	Section 4 ..	Do.
1927	X	The Repealing and Amending Act, 1927.	Sections 3 and 4 and the Second Schedule.	Repealing provisions and savings. Spent.
		Acts made by the Governor General under section 67-B of the Government of India Act.		
1923	..	The Indian Finance Act, 1923.	Sub-section (3) of section 1 .. Sections 4 and 6 .. Section 5 .. Schedules II and III.	Spent. Expired. Superseded by corresponding provision of the Indian Finance Act, 1924.

Year.	No.	Short title.	Extent of Repeal.	Explanation.
		Acts made by the Governor General under section 67-B of the Government of India Act—contd.		
1924	..	The Indian Finance Act, 1924.	Sub-section (3) of section 1 .. Sections 4, 5 and 6 .. Schedules II and III ..	Spent and superseded.
		Regulations.		
1877	III	The Ajmer Laws Regulation, 1877.	Section 2 and Schedule I ..	Repealing provisions. Spent.
1887	X	The Upper Burma Stamps and Limitation Regulation, 1887.	In sub-section (2) of section 1, the word "and"; and sub-section (3) of the same section.	Commencement clause. Spent.
1889	III	The Upper Burma Land and Revenue Regulation, 1889.	Section 2 ..	Repealing section. Spent.
1893	IX	The Ajmer Amending Regulation, 1893.	In sub-section (2) of section 1, the word "and"; and sub-section (3) of the same section.	Commencement clause. Spent.
1895	IV	The Ajmer Village Sanitation Regulation, 1895.	In sub-section (2) of section 1, the word "and"; and sub-section (3) of the same section.	Do.
1896	V	The Chin Hills Regulation, 1896.	So much of the Schedule as relates to Regulation V of 1895.	Regulation V of 1895 has been repealed.
1898	III	The Upper Burma Land and Revenue Regulation (1889) Amendment Regulation, 1898.	In sub-section (2) of section 1, the word "and"; and sub-section (3) of the same section.	Commencement clause. Spent.
			Section 4 ..	Sub-section (3) of section 31 of Regulation III of 1889 which was amended by the section has been replaced by a new sub-section.
1900	II	The Hazara (Upper Tanawal) Regulation, 1900.	In sub-section (1) of section 1, the word "and"; and sub-section (2) of the same section.	Commencement clause. Spent.
1901	IV	The Frontier Murderous Outrages Regulation. 1901.	In sub-section (1) of section 1, the word "and"; and sub-section (2) of the same section.	Do.
			Section 16 ..	Repealing provision. Spent.
1901	VII	The North-West Frontier Province Law and Justice Regulation, 1901.	Sub-section (3) of section 1 ..	Commencement clause. Spent.
			Section 5 and Schedule III ..	Repealing provisions. Spent.

Year.	No.	Short title.	Extent of Repeal.	Explanation.
		Regulations—contd.		
1903	II	The Peshawar Canals (Amendment) Regulation, 1903.	The whole ..	The principal Regulation has been repealed.
1908	III	The Sonthal Parganas Settlement (Amendment) Regulation, 1908.	Sections 3 and 6 ..	Repealing sections. Spent.
1909	II	The North-West Frontier Province Law and Justice (Amendment) Regulations, 1909.	The whole ..	Repealing enactment. Spent.
1910	III	The Aden Arms (Sea-traffic) Regulation, 1910.	Section 14 ..	Repealing provision. Spent.
1910	IV	The Sonthal Parganas Rural Police Regulation, 1910.	Section 26 ..	Do.
1911	III	The Hazara Forest Regulation, 1911.	Section 58 ..	Do.
1911	IV	The Coorg Land and Revenue (Amendment) Regulation, 1911.	Section 3 ..	Do.
1913	II	The British Baluchistan Laws Regulation, 1913.	Section 6 and Schedule II ..	Do.
			So much of Schedule I as relates to Acts— XXX of 1852 .. X of 1865 .. XXI of 1865 .. XX of 1869 .. II of 1874 .. XI of 1879 .. V of 1881 .. VI of 1882 .. XV of 1889 .. XII of 1895 .. IV of 1900 .. VII of 1901 .. I of 1904 .. III of 1907 ..	These Acts have been repealed.
1913	III	The Angul Laws Regulation, 1913.	Section 75 ..	Repealing provision. Spent.
			In the Schedule, the entries relating to— Bengal Regulation X of 1804. Act XI of 1857 .. Act II of 1874 .. Act V of 1881 .. Act IX of 1897 .. Act II of 1910 ..	These have been repealed.
1914	II	The Ajmer Repealing and Amending Regulation, 1914.	In section 1, the words "Repealing and." Sub-section (2) of Section 2 Part II of the Schedule.	Repealing provisions. Spent.

Year.	No.	Short title.	Extent of Repeal.	Explanation.
		Regulations—concld.		
1915	I	The Excise Regulation, 1915..	Section 70 and Schedule ..	Repealing provisions. Spent.
1916	I	The Arakan Hill District Laws Regulation, 1916.	So much of Schedule I as relates to Acts— XXX of 1852 .. XII of 1882 .. VI of 1884 .. II of 1886 .. XV of 1889 .. XII of 1896 .. II of 1910 ..	These Acts have been repealed.
			Section 15 and Schedule ..	Repealing provisions. Spent.
1920	III	The Coorg Noxious Weeds (Repealing) Regulation, 1920.	The whole ..	Repealing enactment. Spent.
1922	II	The Kachin Hill Tribes (Amendment) Regulation, 1922.	The whole ..	Do.
1922	III	The Chin Hills (Amendment) Regulation 1922.	The whole ..	Do.
1923	I	The Arakan Hill District Laws (Amendment) Regulation, 1923.	Sub-section (2) of section 1.	Commencement clause. Spent.
			Section 3. ..	Repealing clause. Spent.
1923	III	The North-West Frontier Province Law and Justice (Amendment) Regulation, 1923.	The whole ..	Repealing enactment. Spent.
1924	I	The North-West Frontier Pre-emption (Repealing) Regulation, 1924.	The whole ..	Do.
1925	I	The Burma (Frontier Districts) Criminal Justice Regulation, 1925.	Section 4 ..	Repealing clause. Spent.
1926	I	The Laccadive Islands and Minicoy (Amendment) Relation, 1926.	Sections 3 and 5 ..	Do.
1926	IV	The North-West Frontier Province Law and Justice (Amendment) Regulation, 1926.	Sub-section (1) of section 5..	Do.
1926	IX	The Ajmer Courts Regulation, 1926.	Section 30 and Schedule ..	Do.

THE INDIAN BAR COUNCILS (AMENDMENT) ACT, 1927.

ACT NO. XIII OF 1927.

[*9th September, 1927.*

An Act to amend the Indian Bar Councils Act, 1926, for certain purposes.

WHEREAS it is expedient to amend the Indian Bar Councils Act, 1926, for the purposes hereinnafter appearing ; it is hereby enacted as follows :—

Short title.

1. This Act may be called THE INDIAN BAR COUNCILS (AMENDMENT) ACT, 1927.

Amendment of section 8, Act XXXVIII of 1926.

2. In section 8 of the Indian Bar Councils Act, 1926 (hereinafter referred to as the said Act), sub-sections (3), (4) and (5) shall be renumbered as sub-sections (5), (6) and (7), respectively, and after sub-section (2) the following sub-sections shall be inserted, namely :—

" (3) Entries in the roll shall be made in the order of seniority, and such seniority shall be determined as follows, namely :—

(*a*) all such persons as are referred to in clause (*a*) of sub-section (2) shall be entered first in the order in which they were respectively entitled to seniority *inter se* immediately before the date on which this section comes into force in respect of the High Court ; and

(*b*) the seniority of any other person admitted to be an advocate of the High Court under this Act after the date shall be determined by the date of his admission or, if he is a barrister, by the date of his admission or the date on which he was called to the Bar, whichever date is earlier :

Provided that, for the purposes of clause (*b*), the seniority of a person who before his admission to be an advocate was entitled as of right to practise in another High Court shall be determined by the date on which he became so entitled.

(4) The respective rights of pre-audience of advocates of the High Court shall be determined by seniority :

Provided that the Advocate General shall have pre-audience over all other advocates, and King's Connsel shall have pre-audience over all advocates except the Advocate General."

Amendment of section 9, Act XXXVIII of 1926.

3. In sub-section (4) of section 9 of the said Act, after the words " any such application " the words " or to prescribe the conditions under which such persons shall be entitled to practice or plead " shall be inserted.

THE INDIAN MERCHANT SHIPPING (AMENDMENT) ACT, 1927.

ACT NO. XIV OF 1927.

[*9th September, 1927.*

An Act further to amend the Indian Merchant Shipping Act, 1923.

WHEREAS it is expedient further to amend the Indian Merchant Shipping Act, 1923, for the purpose hereinafter appearing ; it is hereby enacted as follows :—

Short title and commencement.

1. (1) This Act may be called THE INDIAN MERCHANT SHIPPING (AMENDMENT) ACT, 1927.

(2) It shall come into force on such date as the Governor General in Council may, by notification in the Gazette of India, appoint.

Insertion of new sections 209-B, 209-C and 209-D in Act XXI of 1923.

2. After section 209-A of the Indian Merchant Shipping Act, 1923 (hereinafter referred to as the said Act), the following sections shall be inserted, namely :—

Notice of sailing of pilgrim ship.

"209-B. (1) The master, owner or agent of any ship which is intended to sail on a voyage as a pilgrim ship from any port or place in British India shall, before advertising such ship for the conveyance of pilgrims or offering to convey any pilgrim by such ship or selling or permitting any person to sell a passage ticket to any pilgrim for conveyance by such ship, supply to the prescribed officer (hereinafter referred to as the Pilgrim Officer) at the port or place from which the ship is to commence the voyage, and at each port or place in British India at which it is to touch for the purpose of embarking pilgrims, full particulars as to the class, tonnage and age of the ship, the maximum number of passage tickets of each class to be issued, the maximum price of each class of ticket, the date on which the ship is to sail from that port or place, the ports, if any, at which it is to touch, the place of its destination, and the probable date of its arrival thereat.

(2) The master, owner or agent shall supply to the Pilgrim Officer, within three days from the date of demand, such further information in regard to the matters mentioned in sub-section (1) as that officer may in writing demand from him.

(3) Within such time as may be prescribed before the date of the sailing of any such ship from any port or place in British India, the master, owner or agent of the ship shall advertise at such port or place in such manner as may be prescribed—

(*a*) the place of destination of the ship,

(*b*) the proposed date of sailing from that port or place which shall be the date communicated to the Pilgrim Officer under sub-section (1), and

(*c*) the price of each class of passage tickets, which shall not be in excess of the price communicated to the Pilgrim Officer under sub-section (1).

(4) Any master, owner or agent who—

(*a*) without reasonable cause, the burden of proving which shall lie upon him, fails or refuses to supply any particulars or information which he is by or under this section required to supply or supplies false particulars or information, or

(*b*) advertises any ship for the conveyance of pilgrims, or offers to convey pilgrims by any ship, or sells or promises or permits any person to sell passage tickets to pilgrims for conveyance by any ship, without having first supplied the particulars required by sub-section (1) and in accordance with the provisions of that sub-section, or

(*c*) advertises a date of sailing from any port or place other than the date communicated to the Pilgrim Officer at that port or place under sub-section (1), or advertises a price for passage tickets at that port or place in excess of the price so communicated, or

(*d*) offers to convey pilgrims by any ship from any port or place in British India or sells or promises or permits any person to sell passage tickets to pilgrims for conveyance by a ship from any such port or place without having made advertisement, as required by sub-section (3), of the matters specified in that sub-section, or

(*e*) sells or permits any person to sell to any pilgrim any passage ticket at a price in excess of the price communicated to the Pilgrim Officer under sub-section (1),

shall be punishable with fine which may extend to two thousand rupees.

Compensation for delay in sailing.

209-C. (1) If the pilgrim ship fails to proceed from any port or place on the date advertised under sub-section (3) of section 209-B as the date of sailing therefrom, the master, owner or agent shall become liable to pay as compensation to each pilgrim who has paid his passage money on or before such date the sum of one rupee for each completed day during which the sailing of the ship is delayed after that date :

Provided that such compensation shall not be payable in respect of any period during which the departure of the ship is impossible owing to any cause not arising from the act or default of the master, owner or agent, and the burden of proving such cause shall lie on such master, owner or agent :

Provided, further, that, where compensation has been paid or has become payable to any pilgrim in respect of delay in the sailing of the ship from any port or place and the sailing of the ship from any other port or place is thereafter delayed beyond the date advertised in that behalf, the pilgrim shall be entitled to compensation only in respect of any period by which the duration of such further delay exceeds the duration of the delay in respect of which he has already received or become entitled to compensation.

(2) In the event of such failure, the master, owner or agent shall be bound forthwith to inform the Pilgrim Officer at the port or place at which the delay occurs of the number of passage tickets of each class which have been issued for the voyage on or before the advertised date of sailing.

(3) Any sum payable as compensation under sub-section (1) shall be paid on behalf of the pilgrims entitled thereto to the Pilgrim Officer at the port or place at which the delay occurs on receipt by the master, owner or agent of a notice from that officer specifying the sum payable, and that officer shall, in such manner as may be prescribed, pay to each such pilgrim the compensation paid in respect of his detention :

Provided that, if an objection is made by the master, owner or agent that the sum specified in any such notice or any part of such sum is not payable by him, the sum paid or, as the case may be, the balance thereof remaining after payment to the pilgrims entitled thereto of compensation the right to which is not in dispute, shall be held in deposit until the objection has been decided :

Provided, further, that, if for any reason the compensation due to any pilgrim cannot be paid to him at the time of embarkation or at or before the time of his disembarkation at the port of his destination, the sum so remaining unpaid shall be made over to such authority administering any fund maintained for the assistance of pilgrims as the Local Government may, by general or special order, designate in this behalf.

(4) If the master, owner or agent objects that the sum specified in the notice issued under sub-section (3) or any part thereof is not payable by him, he may, at the time of payment of such sum, give to the Pilgrim Officer notice of his objection, together with a statement of the grounds thereof, and the Pilgrim Officer shall thereupon either cancel or modify the aforesaid notice in accordance with the objection and refund the sum held in deposit under sub-section (3), or refer the objection for decision to a Presidency Magistrate or a Magistrate of the first class exercising jurisdiction in the port or place at which the ship is delayed; the decision of the Magistrate on such reference shall be final, and there shall be refunded to the master, owner, or agent any amount allowed to him by such decision.

(5) On the failure of any pilgrim ship to proceed from any port or place on the date advertised under sub-section (3) of section 209-B as the date of sailing therefrom, the Pilgrim Officer at that port or place shall forthwith give notice of such failure to the officer authorised to grant port-clearance to ships thereat, and such officer shall refuse port-clearance to the pilgrim ship until the master, owner or agent produces to him a certificate of the Pilgrim Officer that all sums payable by way of compensation under this section up to the day on which the ship is to proceed have been paid.

Substitution of ships.

209-D. Notwithstanding anything contained in section 209-B or section 209-C, where any ship which has been advertised under sub-section (3) of section 209-B for the conveyance of pilgrims has been or is likely to be delayed beyond the advertised date of sailing, the owner or agent may, with the permission in writing of the Pilgrim Officer, substitute for it any other ship which is of the same class and is capable of carrying not less than the same number of pilgrims of each class, and on such permission being given the advertisement shall be deemed to have been made in respect of the ship so substituted, and all the provisions of those sections shall apply accordingly in respect of such ship."

Amendment of section 213, Act XXI of 1923.

3. In sub-section (1) of section 213 of the said Act, after clause (qq) the following clause shall be inserted, namely:—

"(qqq) the manner in which the proposed date of sailing shall be advertised under section 209-B; the appointment of Pilgrim Officers for the purposes of that section and sections 209-C and 209-D; the manner in which payment shall be made under section 209-C to pilgrims and to the Pilgrim Officer; and the procedure to be followed by masters, owners or agents and by Pilgrim Officers and Magistrates in proceedings under that section;"

Repeals.

4. Sections 11, 12, 12-A and 12-B of the Protection of Pilgrims Act, 1887, and sections 11 and 12 of the Protection of Muhammadan Pilgrims Act, 1896, are hereby repealed.

THE INDIAN DIVORCE (AMENDMENT) ACT, 1927.

ACT NO. XV OF 1927.

[*9th September, 1927.*

An Act further to amend the Indian Divorce Act for a certain purpose.

WHEREAS it is expedient further to amend the Indian Divorce Act for the purpose hereinafter appearing; it is hereby enacted as follows:—

1. This Act may be called THE INDIAN DIVORCE (AMENDMENT) ACT, 1927. Short title.

2. After section 17 of the Indian Divorce Act the following section shall be inserted, namely :— Insertion of new section 17-A in Act IV of 1869.

"17-A. The Governor-General in Council may appoint for each High Court of Judicature established by Letters Patent an officer who shall, within the jurisdiction of the High Court for which he is appointed, have the like right of showing cause why a decree for the dissolution of marriage should not be made absolute or should not be confirmed, as the case may be, as is exercisable in England by the King's Proctor, and the Governor-General in Council may make rules regulating the manner in which the right shall be exercised and all matters incidental to, or consequential on, such exercise." Appointment of officer to exercise duties of King's Proctor.

THE INDIAN FOREST ACT, 1927.

ACT NO. XVI OF 1927.

[*21st September, 1927.*

An Act to consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce.

WHEREAS it is expedient to consolidate the law relating to forests, the transit of forest-produce and the duty leviable on timber and other forest-produce ; it is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

1. (1) This Act may be called THE INDIAN FOREST ACT, 1927. Short title and extent.

(2) It extends to Bombay, Bengal, Bihar and Orissa, the United Provinces, the Punjab, the Central Provinces and the North-West Frontier Province (except the District of Hazara).

(3) The Local Government of any other province may, by notification in the local official Gazette, extend this Act to the whole or any specified part of the province.

2. In this Act, unless there is anything repugnant in the subject or context,— Interpretation clause.

(1) "cattle" includes elephants, camels, buffaloes, horses, mares, geldings, ponies, colts, fillies, mules, asses, pigs, rams, ewes, sheep, lambs, goats and kids ;

(2) "Forest-officer" means any person whom the Governor-General in Council, or the Local Government or any officer empowered by the Governor-General in Council or the Local Government in this behalf, may appoint to carry out all or any of the purposes of this Act or to do anything required by this Act or any rule made thereunder to be done by a Forest-officer ,

(3) "forest-offence" means an offence punishable under this Act or under any rule made thereunder ;

(4) "forest-produce" includes—

(a) the following whether found in, or brought from, a forest or not, that is to say:—

"timber, charcoal, caoutchouc, catechu, wood-oil, resin, natural varnish, bark, lac, mahua flowers, mahua seeds and myrabolams, and

(b) the following when found in, or brought from, a forest, that is to say,—

(i) trees and leaves, flowers and fruits, and all other parts or produce not hereinbefore mentioned, of trees,

(ii) plants not being trees (including grass, creepers, reeds and moss), and all parts or produce of such plants,

(iii) wild animals and skins, tusks, horns, bones, silk, cocoons, honey, and wax, and all other parts or produce of animals, and

(iv) peat, surface soil, rock, and minerals (including limestone, laterite, mineral oils, and all products of mines or quarries);

(5) "river" includes any stream, canal, creek or other channels, natural or artificial;

(6) "timber" includes trees when they have fallen or have been felled, and all wood whether cut up or fashioned or hollowed out for any purpose or not; and

(7) "tree" includes palms, bamboos, stumps, brush-wood and canes.

CHAPTER II.

OF RESERVED FORESTS.

Power to reserve forests.

3. The Local Government may constitute any forest land or waste-land which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled, a reserved forest in the manner hereinafter provided.

Notification by Local Government.

4. (1) Whenever it has been decided to constitute any land a reserved forest, the Local Government shall issue a notification in the local official Gazette—

(a) declaring that it has been decided to constitute such land a reserved forest;

(b) specifying, as nearly as possible, the situation and limits of such land, and

(c) appointing an officer (hereinafter called "the Forest Settlement-officer") to inquire into and determine the existence, nature and extent of any rights alleged to exist in favour of any person in or over any land comprised within such limits, or in or over any forest-produce, and to deal with the same as provided in this Chapter.

Explanation.—For the purpose of clause (b), it shall be sufficient to describe the limits of the forest by roads, rivers, ridges or other well-known or readily intelligible boundaries.

(2) The officer appointed under clause (c) of sub-section (1) shall ordinarily be a person not holding any forest-office except that of Forest Settlement-officer.

(3) Nothing in this section shall prevent the Local Government from appointing any number of officers not exceeding three, not more

than one of whom shall be a person holding any forest-office except as aforesaid, to perform the duties of a Forest Settlement-officer under this Act.

Bar of accrual of forest rights.

5. After the issue of a notification under section 4, no right shall be acquired in or over the land comprised in such notification, except by succession or under a grant or contract in writing made or entered into by or on behalf of Government or some person in whom such right was vested when the notification was issued; and no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the Local Government in this behalf.

Proclamation by Forest Settlement-officer.

6. When a notification has been issued under section 4, the Forest Settlement-officer shall publish in the local vernacular in every town and village in the neighbourhood of the land comprised therein, a proclamation—

(a) specifying, as nearly as possible, the situation and limits of the proposed forest;

(b) explaining the consequences which, as hereinafter provided, will ensue on the reservation of such forest; and

(c) fixing a period of not less than three months from the date of such proclamation, and requiring every person claiming any right mentioned in section 4 or section 5 within such period either to present to the Forest Settlement-officer a written notice specifying or to appear before him and state, the nature of such right and the amount and particulars of the compensation (if any) claimed in respect thereof.

Inquiry by Forest Settlement-officer.

7. The Forest Settlement-officer shall take down in writing all statements made under section 6, and shall at some convenient place inquire into all claims duly preferred under that section, and the existence of any rights mentioned in section 4 or section 5 and not claimed under section 6 so far as the same may be ascertainable from the records of Government and the evidence of any persons likely to be acquainted with the same.

Powers of Forest Settlement-officer.

8. For the purpose of such inquiry, the Forest Settlement-officer may exercise the following powers, that is to say:—

(a) power to enter, by himself or any officer authorised by him for the purpose, upon any land, and to survey, demarcate and make a map of the same; and

(b) the powers of a Civil Court in the trial of suits.

Extinction of rights.

9. Rights in respect of which no claim has been preferred under section 6, and of the existence of which no knowledge has been acquired by inquiry under section 7, shall be extinguished, unless, before the notification under section 20 is published, the person claiming them satisfies the Forest Settlement-officer that he had sufficient cause for not preferring such claim within the period fixed under section 6.

Treatment of claims relating to practice of shifting cultivation.

10. (1) In the case of a claim relating to the practice of shifting cultivation, the Forest Settlement-officer shall record a statement setting forth the particulars of the claim and of any local rule or order under which the practice is allowed or regulated, and submit the statement to the Local Government, together with his opinion as to whether the practice should be permitted or prohibited wholly or in part.

(2) On receipt of the statement and opinion, the Local Government may make an order permitting or prohibiting the practice wholly or in part.

(3) If such practice is permitted wholly or in part, the Forest Settlement-officer may arrange for its exercise—

(*a*) by altering the limits of the land under settlement so as to exclude land of sufficient extent, of a suitable kind, and in a locality reasonably convenient for the purposes of the claimants, or

(*b*) by causing certain portions of the land under settlement to be separately demarcated, and giving permission to the claimants to practice shifting cultivation therein under such conditions as he may prescribe.

(4) All arrangements made under sub-section (3) shall be subject to the previous sanction of the Local Government.

(5) The practice of shifting cultivation shall in all cases be deemed a privilege subject to control, restriction and abolition by the Local Government.

Power to acquire land over which right is claimed.

11. (1) In the case of a claim to right in or over any land, other than a right-of-way or right-of-pasture, or a right to forest-produce or a water-course, the Forest Settlement-officer shall pass an order admitting or rejecting the same in whole or in part.

(2) If such claim is admitted in whole or in part, the Forest Settlement-officer shall either—

(*i*) exclude such land from the limits of the proposed forest; or

(*ii*) come to an agreement with the owner thereof for the surrender of his rights; or

(*iii*) proceed to acquire such land in the manner provided by the Land Acquisition Act, 1894.

(3) For the purpose of so acquiring such land—

(*a*) the Forest Settlement-officer shall be deemed to be a Collector proceeding under the Land Acquisition Act, 1894;

(*b*) the claimant shall be deemed to be a person interested and appearing before him in pursuance of a notice given under section 9 of that Act;

(*c*) the provisions of the preceding sections of that Act shall be deemed to have been complied with; and

(*d*) the Collector, with the consent of the claimant, or the Court, with the consent of both parties, may award compensation in land, or partly in land, and partly in money.

Order on claims to rights of pasture or to forest-produce.

12. In the case of a claim to rights of pasture or to forest-produce, the Forest Settlement-officer shall pass an order admitting or rejecting the same in whole or in part.

Record to be made by Forest Settlement-officer.

13. The Forest Settlement-officer, when passing any order under section 12, shall record, so far as may be practicable,—

(*a*) the name, father's name, caste, residence and occupation of the person claiming the right; and

(*b*) the designation, position and area of all fields or groups of fields (if any), and the designation and position of all buildings (if any) in respect of which the exercise of such rights is claimed.

14. If the Forest Settlement-officer admits in whole or in part any claim under section 12, he shall also record the extent to which the claim is so admitted, specifying the number and description of the cattle which the claimant is from time to time entitled to graze in the forest, the season during which such pasture is permitted, the quantity of timber and other forest-produce which he is from time to time authorised to take or receive, and such other particulars as the case may require. He shall also record whether the timber or other forest-produce obtained by the exercise of the rights claimed may be sold or bartered. Record where he admits claim.

15. (1) After making such record the Forest Settlement-officer shall, to the best of his ability, and having due regard to the maintenance of the reserved forest in respect of which the claim is made, pass such orders as will ensure the continued exercise of the rights so admitted. Exercise of rights admitted.

(2) For this purpose the Forest Settlement-officer may—

(*a*) set out some other forest-tract of sufficient extent, and in a locality reasonably convenient, for the purposes of such claimants, and record an order conferring upon them a right of pasture or to forest-produce (as the case may be) to the extent so admitted ; or

(*b*) so alter the limits of the proposed forest as to exclude forest-land of sufficient extent, and in a locality reasonably convenient, for the purposes of the claimants ; or

(*c*) record an order, continuing to such claimants a right of pasture or to forest-produce, as the case may be, to the extent so admitted, at such seasons, within such portions of the proposed forest, and under such rules, as may be made in this behalf by the Local Government.

16. In case the Forest Settlement-officer finds it impossible, having due regard to the maintenance of the reserved forest, to make such settlement under section 15 as shall ensure the continued exercise of the said rights to the extent so admitted, he shall, subject to such rules as the Local Government may make in this behalf, commute such rights, by the payment to such persons of a sum of money in lieu thereof, or by the grant of land, or in such other manner as he thinks fit. Commutation of rights.

17. Any person who has made a claim under this Act, or any Forest-officer or other person generally or specially empowered by the Local Government in this behalf, may, within three months from the date of the order passed on such claim by the Forest Settlement-officer under section 11, section 12, section 15 or section 16, present an appeal from such order to such officer of the Revenue Department, of rank not lower than that of a Collector, as the Local Government may, by notification in the local official Gazette, appoint to hear appeals from such orders. Appeal from order passed under section 11, section 12, section 15 or section 16.

Provided that the Local Government may establish a Court (hereinafter called the Forest Court) composed of three persons to be appointed by the Local Government, and, when the Forest Court has been so established, all such appeals shall be presented to it.

18. (1) Every appeal under section 17 shall be made by petition in writing, and may be delivered to the Forest Settlement-officer, who shall forward it without delay to the authority competent to hear the same. Appeal under section 17.

(2) If the appeal be to an officer appointed under section 17, it shall be heard in the manner prescribed for the time being for the hearing of appeals in matters relating to land-revenue.

(3) If the appeal be to the Forest Court, the Court shall fix a day and a convenient place in the neighbourhood of the proposed forest for hearing the appeal, and shall give notice thereof to the parties, and shall hear such appeal accordingly.

(4) The order passed on the appeal by such officer or Court, or by the majority of the members of such Court, as the case may be, shall, subject only to revision by the Local Government, be final.

Pleaders.

19. The Local Government, or any person who has made a claim under this Act, may appoint any person to appear, plead and act on its or his behalf before the Forest Settlement-officer, or the appellate officer or Court, in the course of any inquiry or appeal under this Act.

Notification declaring forest reserved.

20. (1) When the following events have occurred, namely:—

(a) the period fixed under section 6 for preferring claims has elapsed, and all claims, if any, made under that section or section 9 have been disposed of by the Forest Settlement-officer;

(b) If any such claims have been made, the period limited by section 17 for appealing from the orders passed on such claims has elapsed, and all appeals (if any) presented within such period have been disposed of by the appellate officer or Court; and

(c) all lands (if any) to be included in the proposed forest, which the Forest Settlement-officer has, under section 11, elected to acquire under the Land Acquisition Act, 1894, have become vested in the Government under section 16 of that Act,

the Local Government shall publish a notification in the local official Gazette, specifying definitely, according to boundary marks erected or otherwise, the limits of the forest which is to be reserved, and declaring the same to be reserved from a date fixed by the notification.

(2) From the date so fixed such forest shall be deemed to be a reserved forest.

Publication of translation of such notification in neighbourhood of forest.

21. The Forest-officer shall, before the date fixed by such notification, cause a translation thereof into the local vernacular to be published in every town and village in the neighbourhood of the forest.

Power to revise arrangement made under section 15 or section 18.

22. The local Government may, within five years from the publication of any notification under section 20, revise any arrangement made under section 15 or section 18, and may for this purpose rescind or modify any order made under section 15 or section 18, and direct that any one of the proceedings specified in section 15 be taken in lieu of any other of such proceedings, or that the rights admitted under section 12 be commuted under section 16.

No right acquired over reserved forest, except as here provided.

23. No right of any description shall be acquired in or over a reserved forest except by succession or under a grant or contract in writing made by or on behalf of the Government or some person in whom such right was vested when the notification under section 20 was issued.

Rights not to be alienated without sanction.

24. (1) Notwithstanding anything contained in section 23, no right continued under clause (c) of sub-section (2) of section 15 shall be alienated by way of grant, sale, lease, mortgage or otherwise, without the sanction of the Local Government:

Provided that, when any such right is appendant to any land or house, it may be sold or otherwise alienated with such land or house.

(2) No timber or other forest-produce obtained in exercise of any such right shall be sold or bartered except to such extent as may have been admitted in the order recorded under section 14.

Power to stop ways and water-courses in reserved forests.

25. The Forest-officer may, with the previous sanction of the Local Government or of any officer duly authorised by it in this behalf, stop any public or private way or water-course in a reserved forest, provided that a substitute for the way or water-course so stopped, which the Local Government deems to be reasonably convenient, already exists, or has been provided or constructed by the Forest-officer in lieu thereof.

Acts prohibited in such forests.

26. (1) Any person who—

(*a*) makes any fresh clearing prohibited by section 5, or

(*b*) sets fire to a reserved forest or, in contravention of any rules made by the Local Government in this behalf, kindles any fire, or leaves any fire burning, in such manner as to endanger such a forest; or who, in a reserved forest—

(*c*) kindles, keeps or carries any fire except at such seasons as the Forest-officer may notify in this behalf;

(*d*) trespasses or pastures cattle, or permits cattle to trespass;

(*e*) causes any damage by negligence in felling any tree or cutting or dragging any timber:

(*f*) fells, girdles, lops, taps or burns any tree or strips off the bark or leaves from, or otherwise damages, the same;

(*g*) quarries stone, burns lime or charcoal, or collects, subjects to any manufacturing process, or removes, any forest-produce;

(*h*) clears or breaks up any land for cultivation or any other purpose;

(*i*) in contravention of any rules made in this behalf by the Local Government hunts, shoots, fishes, poisons water or sets traps or snares; or

(*j*) in any area in which the Elephants' Preservation Act, 1879, is not in force, kills or catches elephants in contravention of any rules so made;

shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both, in addition to such compensation for damage done to the forest as the convicting Court may direct to be paid.

(2) Nothing in this section shall be deemed to prohibit—

(*a*) any act done by permission in writing of the Forest-officer, or under any rule made by the Local Government; or

(*b*) the exercise of any right continued under clause (*c*) of sub-section (2) of section 15, or created by grant or contract in writing made by or on behalf of Government under section 23.

(3) Whenever fire is caused wilfully or by gross negligence in a reserved forest, the Local Government may (notwithstanding that any penalty has been inflicted under this section) direct that in such forest or any portion thereof the exercise of all rights of pasture or to forest-produce shall be suspended for such period as it thinks fit.

Power to declare forest no longer reserved.

27. (1) The Local Government may, subject to the control of the Governor-General in Council, by notification in the local official Gazette, direct that, from a date fixed by such notification, any forest or any portion thereof reserved under this Act shall cease to be a reserved forest.

(2) From the date so fixed, such forest or portion shall cease to be reserved; but the rights (if any) which have been extinguished therein shall not revive in consequence of such cessation.

CHAPTER III.

OF VILLAGE-FORESTS.

Formation of village forests.

28. (1) The Local Government may assign to any village-community the rights of Government to or over any land which has been constituted a reserved forest, and may cancel such assignment. All forests so assigned shall be called village-forests.

(2) The Local Government may make rules for regulating the management of village-forests, prescribing the conditions under which the community to which any such assignment is made may be provided with timber or other forest-produce or pasture, and their duties for the protection and improvement of such forest.

(3) All the provisions of this Act relating to reserved forests shall (so far as they are not inconsistent with the rules so made) apply to village-forests.

CHAPTER IV.

OF PROTECTED FORESTS.

Protected forests.

29. (1) The Local Government may, by notification in the local official Gazette, declare the provisions of this Chapter applicable to any forest-land or waste-land which is not included in a reserved forest, but which is the property of Government, or over which the Government has proprietary rights, or to the whole or any part of the forest-produce of which the Government is entitled.

(2) The forest-land and waste-lands comprised in any such notification shall be called a "protected forest".

(3) No such notification shall be made unless the nature and extent of the rights of Government and of private persons in or over the forest-land or waste-land comprised therein have been inquired into and recorded at a survey or settlement, or in such other manner as the Local Government thinks sufficient. Every such record shall be presumed to be correct until the contrary is proved:

Provided that, if, in the case of any forest-land or waste-land, the Local Government thinks that such inquiry and record are necessary, but that they will occupy such length of time as in the meantime to endanger the rights of Government, the Local Government may, pending such inquiry and record, declare such land to be a protected forest, but so as not to abridge or affect any existing rights of individuals or communities.

Power to issue notification reserving trees, etc.

30. The Local Government may, by notification in the local official Gazette,—

(a) declare any trees or class of trees in a protected forest to be reserved from a date fixed by the notification ;

(b) declare that any portion of such forest specified in the notification shall be closed for such term, not exceeding thirty years, as the Local Government thinks fit, and that the rights of private persons, if any, over such portion shall be suspended during such term, provided that the remainder of such forest be sufficient, and in a locality reasonably convenient, for the due exercise of the rights suspended in the portion so closed ; or

(c) prohibit, from a date fixed as aforesaid, the quarrying of stone, or the burning of lime or charcoal, or the collection or subjection to any manufacturing process, or removal of, any forest-produce in any such forest, and the breaking up or clearing for cultivation, for building, for herding cattle or for any other purpose, of any land in any such forest.

Publication of translation of such notification in neighbourhood.

31. The Collector shall cause a translation into the local vernacular of every notification issued under section 30 to be affixed in a conspicuous place in every town and village in the neighbourhood of the forest comprised in the notification.

Power to make rules for protected forests.

32. The Local Government may make rules to regulate the following matters, namely :—

(a) The cutting, sawing, conversion and removal of trees and timber, and the collection, manufacture and removal of forest-produce, from protected forests ;

(b) the granting of licences to the inhabitants of towns and villages in the vicinity of protected forests to take trees, timber or other forest-produce for their own use, and the production and return of such licences by such persons ;

(c) the granting of licences to persons felling or removing trees or timber or other forest-produce from such forests for the purposes of trade, and the production and return of such licences by such persons ;

(d) the payments, if any, to be made by the persons mentioned in clauses (b) and (c) for permission to cut such trees, or to collect and remove such timber or other forest-produce ;

(e) the other payments, if any, to be made by them in respect of such trees, timber and produce, and the places where such payment shall be made ;

(f) the examination of forest-produce passing out of such forests ;

(g) the clearing and breaking up of land for cultivation or other purposes in such forests ;

(h) the protection from fire of timber lying in such forests and of trees reserved under section 30 ;

(i) the cutting of grass and pasturing of cattle in such forests ;

(j) hunting, shooting, fishing, poisoning water and setting traps or snares in such forests, and the killing or catching of elephants in such forests in areas in which the Elephants' Preservation Act, 1879, is not in force ;

(k) the protection and management of any portion of a forest closed under section 30 ; and

(*l*) the exercise of rights referred to in section 29.

Penalties for acts in contravention of notification under section 30 or of rules under section 32.

33. (1) Any person who commits any of the following offences, namely :—

(*a*) fells, girdles, lops, taps or burns any tree reserved under section 30, or strips off the bark or leaves from, or otherwise damages, any such tree ;

(*b*) contrary to any prohibition under section 30, quarries any stone, or burns any lime or charcoal, or collects, subjects to any manufacturing process, or removes any forest-produce ;

(*c*) contrary to any prohibition under section 30, breaks up or clears for cultivation or any other purpose any land in any protected forest ;

(*d*) sets fire to such forest, or kindles a fire without taking all reasonable precautions to prevent its spreading to any tree reserved under section 30, whether standing, fallen or felled, or to any closed portion of such forest ;

(*e*) leaves burning any fire kindled by him in the vicinity of any such tree or closed portion ;

(*f*) fells any tree or drags any timber so as to damage any tree reserved as aforesaid ;

(*g*) permits cattle to damage any such tree ;

(*h*) infringes any rule made under section 32 ;

shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

(2) Whenever fire is caused wilfully or by gross negligence in a protected forest, the Local Government may, notwithstanding that any penalty has been inflicted under this section, direct that in such forest or any portion thereof the exercise of any right of pasture or to forest-produce shall be suspended for such period as it thinks fit.

Nothing in this Chapter to prohibit acts done in certain cases.

34. Nothing in this Chapter shall be deemed to prohibit any act done with the permission in writing of the Forest-officer, or in accordance with rules made under section 32, or, except as regards any portion of a forest closed under section 30, or as regards any rights the exercise of which has been suspended under section 33, in the exercise of any right recorded under section 29.

CHAPTER V.

OF THE CONTROL OVER FORESTS AND LANDS NOT BEING THE PROPERTY OF GOVERNMENT.

Protection of forests for special purposes.

35. (1) The Local Government may, by notification in the local official Gazette, regulate or prohibit in any forest or waste-land—

(*a*) the breaking up or clearing of land for cultivation ;

(*b*) the pasturing of cattle ; or

(*c*) the firing or clearing of the vegetation ;

when such regulation or prohibition appears necessary for any of the following purposes :—

(*i*) for protection against storms, winds, rolling stones, floods and avalanches ;

(*ii*) for the preservation of the soil on the ridges and slopes and in the valleys of hilly tracts, the prevention of land-slips or of the formation of ravines and torrents, or the protection of land against erosion, or the deposit thereon of sand, stones or gravel ;

(*iii*) for the maintenance of a water-supply in springs, rivers and tanks ;

(*iv*) for the protection of roads, bridges, railways and other lines of communication ;

(*v*) for the preservation of the public health.

(2) The Local Government may, for any such purpose, construct at its own expense, in or upon any forest or waste-land, such work as it thinks fit.

(3) No notification shall be made under sub-section (1) nor shall any work be begun under sub-section (2), until after the issue of a notice to the owner of such forest or land calling on him to show cause, within a reasonable period to be specified in such notice, why such notification should not be made or work constructed, as the case may be, and until his objections, if any, and any evidence he may produce in support of the same, have been heard by an officer duly appointed in that behalf and have been considered by the Local Government.

Power to assume management of forests.

36. (1) In case of neglect of, or wilful disobedience to, any regulation or prohibition under section 35, or if the purposes of any work to be constructed under that section so require, the Local Government may, after notice in writing to the owner of such forest or land and after considering his objections, if any, place the same under the control of a Forest-officer, and may declare that all or any of the provisions of this Act relating to reserved forests shall apply to such forest or land.

(2) The net profits, if any, arising from the management of such forest or land shall be paid to the said owner.

Expropriation of forests in certain cases.

37. (1) In any case under this Chapter in which the Local Government considers that, in lieu of placing the forest or land under the control of a Forest-officer, the same should be acquired for public purposes, the Local Government may proceed to acquire it in the manner provided by the Land Acquisition Act, 1894.

(2) The owner of any forest or land comprised in any notification under section 35 may, at any time not less than three or more than twelve years from the date thereof, require that such forest or land shall be acquired for public purposes, and the Local Government shall acquire such forest or land accordingly.

Protection of forests at request of owners.

38. (1) The owner of any land or, if there be more than one owner thereof, the owners of shares therein amounting in the aggregate to at least two-thirds thereof may, with a view to the formation or conservation of forests thereon, represent in writing to the Collector their desire—

(*a*) that such land be managed on their behalf by the Forest-officer as a reserved or a protected forest on such terms as may be mutually agreed upon ; or

(*b*) that all or any of the provisions of this Act be applied to such land.

(2) In either case, the Local Government may, by notification in the local official Gazette, apply to such land such provisions of this Act as it thinks suitable to the circumstances thereof and as may be desired by the applicants.

CHAPTER VI.

OF THE DUTY ON TIMBER AND OTHER FOREST-PRODUCE.

Power to impose duty on timber and other forest-produce.

39. (1) The Local Government may levy a duty in such manner, at such places and at such rates as it may declare by notification in the local official Gazette on all timber or other forest-produce—

(*a*) which is produced in British India, and in respect of which the Government has any right;

(*b*) which is brought from any place outside British India:

Provided that a notification directing the levy of a duty, in the case of timber and other forest-produce brought from any place outside British India which is not under the control of the Local Government, shall not be issued without the previous sanction of the Governor General in Council.

(2) In every case in which such duty is directed to be levied *ad valorem*, the Local Government may fix by like notification the value on which such duty shall be assessed.

(3) All duties on timber or other forest-produce which, at the time when this Act comes into force in any territory, are levied therein under the authority of the Local Government, shall be deemed to be and to have been duly levied under the provisions of this Act.

Limit not to apply to purchase-money or royalty.

40. Nothing in this Chapter shall be deemed to limit the amount, if any, chargeable as purchase-money or royalty on any timber or other forest-produce, although the same is levied on such timber or produce while in transit, in the same manner as duty is levied.

CHAPTER VII.

OF THE CONTROL OF TIMBER AND OTHER FOREST-PRODUCE IN TRANSIT.

Power to make rules to regulate transit of forest-produce.

41. (1) The control of all rivers and their banks as regards the floating of timber, as well as the control of all timber and other forest-produce in transit by land or water, is vested in the Local Government, and it may make rules to regulate the transit of all timber and other forest produce.

(2) In particular and without prejudice to the generality of the foregoing power such rules may—

(*a*) prescribe the routes by which alone timber or other forest-produce may be imported, exported or moved into, from or within British India;

(*b*) prohibit the import or export or moving of such timber or other produce without a pass from an officer duly authorised to issue the same, or otherwise than in accordance with the conditions of such pass;

(*c*) provide for the issue, production and return of such passes and for the payment of fees therefor;

(*d*) provide for the stoppage, reporting, examination and marking of timber or other forest-produce in transit, in respect of which there is reason to believe that any money is payable to Government on account of the price thereof, or on account of any duty, fee, royalty or charge due thereon, or, to which it is desirable for the purposes of this Act to affix a mark;

(e) provide for the establishment and regulation of depots to which such timber or other produce shall be taken by those in charge of it for examination, or for the payment of such money, or in order that such marks may be affixed to it; and the conditions under which such timber or other produce shall be brought to, stored at and removed from such depots;

(f) prohibit the closing up or obstructing of the channel or banks of any river used for the transit of timber or other forest-produce, and the throwing of grass, brushwood, branches or leaves into any such river or any act which may cause such river to be closed or obstructed;

(g) provide for the prevention or removal of any obstruction of the channel or banks of any such river, and for recovering the cost of such prevention or removal from the person whose acts or negligence necessitated the same;

(h) prohibit absolutely or subject to conditions, within specified local limits, the establishment of saw-pits, the converting, cutting, burning, concealing or making of timber, the altering or effacing of any marks on the same, or the possession or carrying of marking hammers or other implements used for marking timber;

(i) regulate the use of property marks for timber, and the registration of such marks; prescribe the time for which such registration shall hold good; limit the number of such marks that may be registered by any one person, and provide for the levy of fees for such registration.

(3) The Local Government may direct that any rule made under this section shall not apply to any specified class of timber or other forest-produce or to any specified local area.

Penalty for breach of rules made under section 41.

42. (1) The Local Government may by such rules prescribe as penalties for the contravention thereof imprisonment for a term which may extend to six months, or fine which may extend to five hundred rupees, or both.

(2) Such rules may provide that penalties which are double of those mentioned in sub-section (1) may be inflicted in cases where the offence is committed after sunset and before sunrise, or after preparation for resistance to lawful authority, or where the offender has been previously convicted of a like offence.

Government and Forest-officers not liable for damage to forest-produce at depot.

43. The Government shall not be responsible for any loss or damage which may occur in respect of any timber or other forest-produce while at a depot established under a rule made under section 41, or while detained elsewhere, for the purposes of this Act; and no Forest-officer shall be responsible for any such loss or damage, unless he causes such loss or damage negligently, maliciously or fraudulently.

All persons bound to aid in case of accident at depot.

44. In case of any accident or emergency involving danger to any property at any such depot, every person employed at such depot, whether by the Government or by any private person, shall render assistance to any Forest-officer or Police-officer demanding his aid in averting such danger or securing such property from damage or loss.

CHAPTER VIII.

OF THE COLLECTION OF DRIFT AND STRANDED TIMBER.

Certain kinds of timber to be deemed property of Government until title thereto proved, and may be collected accordingly.

45. (1) All timber found adrift, beached, stranded or sunk;

all wood or timber bearing marks which have not been registered in accordance with the rules made under section 41, or on which the marks have been obliterated. altered or defaced by fire or otherwise; and

in such areas as the Local Government directs, all unmarked wood and timber;

shall be deemed to be the property of Government, unless and until any person establishes his right and title thereto, as provided in this Chapter.

(2) Such timber may be collected by any Forest-officer or other person entitled to collect the same by virtue of any rule made under section 51, and may be brought to any depot which the Forest-officer may notify as a depot for the reception of drift timber.

(3) The Local Government may, by notification in the local official Gazette, exempt any class of timber from the provisions of this section.

Notice to claimants of drift-timber.

46. Public notice shall from time to time be given by the Forest-officer of timber collected under section 45. Such notice shall contain a description of the timber, and shall require any person claiming the same to present to such officer, within a period not less than two months from the date of such notice, a written statement of such claim.

Procedure on claim preferred to such timber.

47. (1) When any such statement is presented as aforesaid, the Forest-officer may, after making such inquiry as he thinks fit, either reject the claim after recording his reasons for so doing, or deliver the timber to the claimant.

(2) If such timber is claimed by more than one person, the Forest-officer may either deliver the same to any of such persons whom he deems entitled thereto, or may refer the claimants to the Civil Courts, and retain the timber pending the receipt of an order from any such Court for its disposal.

(3) Any person whose claim has been rejected under this section may, within three months from the date of such rejection, institute a suit to recover possession of the timber claimed by him; but no person shall recover any compensation or costs against the Government, or against any Forest-officer, on account of such rejection, or the detention or removal of any timber, or the delivery thereof to any other person under this section.

(4) No such timber shall be subject to process of any Civil, Criminal or Revenue Court until it has been delivered, or a suit has been brought, as provided in this section.

Disposal of unclaimed timber.

48. If no such statement is presented as aforesaid, or if the claimant omits to prefer his claim in the manner and within the period fixed by the notice issued under section 46, or on such claim having been so preferred by him and having been rejected, omits to institute a suit to recover possession of such timb r within the further period fixed by section 47, the ownership of such timber shall vest in the Government, or, when such timber has been delivered to another person under section 47, in such other person free from all encumbrances not created by him.

49. The Government shall not be responsible for any loss or damage which may occur in respect of any timber collected under section 45, and no Forest-officer shall be responsible for any such loss or damage, unless he causes such loss or damage negligently, maliciously or fraudulently. Government and its officers not liable for damage to such timber.

50. No person shall be entitled to recover possession of any timber collected or delivered as aforesaid until he has paid to the Forest-officer or other person entitled to receive it such sum on account thereof as may be due under any rule made under section 51. Payments to be made by claimant before timber is delivered to him.

51. (1) The Local Government may make rules to regulate the following matters, namely:— Power to make rules and prescribe penalties.

(a) the salving, collection and disposal of all timber mentioned in section 45;

(b) the use and registration of boats used in salving and collecting timber;

(c) the amounts to be paid for salving, collecting, moving, storing or disposing of such timber; and

(d) the use and registration of hammers and other instruments to be used for marking such timber.

(2) The Local Government may prescribe, as penalties for the contravention of any rules made under this section, imprisonment for a term which may extend to six months, or fine which may extend to five hundred rupees, or both.

CHAPTER IX.

PENALTIES AND PROCEDURE.

52. (1) When there is reason to believe that a forest-offence has been committed in respect of any forest-produce, such produce, together with all tools, boats, carts or cattle used in committing any such offence, may be seized by any Forest-officer or Police-officer. Seizure of property liable to confiscation.

(2) Every officer seizing any property under this section shall place on such property a mark indicating that the same has been so seized, and shall, as soon as may be, make a report of such seizure to the Magistrate having jurisdiction to try the offence on account of which the seizure has been made:

Provided that, when the forest-produce with respect to which such offence is believed to have been committed is the property of Government, and the offender is unknown, it shall be sufficient if the officer makes, as soon as may be, a report of the circumstances to his official superior.

53. Any Forest-officer of a rank not inferior to that of a Ranger who, or whose subordinate, has seized any tools, boats, carts or cattle under section 52, may release the same on the execution by the owner thereof of a bond for the production of the property so released, if and when so required, before the Magistrate having jurisdiction to try the offence on account of which the seizure has been made. Power to release property seized under section 52.

54. Upon the receipt of any such report, the Magistrate shall, with all convenient despatch, take such measures as may be necessary Procedure thereupon.

for the arrest and trial of the offender and the disposal of the property according to law.

Forest-produce, tools, etc., when liable to confiscation.

55. (1) All timber or forest-produce which is not the property of Government and in respect of which a forest-offence has been committed, and all tools, boats, carts and cattle used in committing any forest-offence, shall be liable to confiscation.

(2) Such confiscation may be in addition to any other punishment prescribed for such offence.

Disposal, on conclusion of trial for forest-offence, of produce in respect of which it was committed.

56. When the trial of any forest-offence is concluded, any forest-produce in respect of which such offence has been committed shall, if it is the property of Government or has been confiscated, be taken charge of by a Forest-officer, and, in any other case, may be disposed of in such manner as the Court may direct.

Procedure when offender not known, or cannot be found.

57. When the offender is not known or cannot be found, the Magistrate may, if he finds that an offence has been committed, order the property in respect of which the offence has been committed to be confiscated and taken charge of by the Forest-officer, or to be made over to the person whom the Magistrate deems to be entitled to the same :

Provided that no such order shall be made until the expiration of one month from the date of seizing such property, or without hearing the person, if any, claiming any right thereto, and the evidence, if any, which he may produce in support of his claim.

Procedure as to perishable property seized under section 52.

58. The Magistrate may, notwithstanding anything hereinbefore contained, direct the sale of any property seized under section 52 and subject to speedy and natural decay, and may deal with the proceeds as he would have dealt with such property if it had not been sold.

Appeal from orders under section 55, section 56 or section 57.

59. The officer who made the seizure under section 52, or any of his official superiors, or any person claiming to be interested in the property so seized, may, within one month from the date of any order passed under section 55, section 56 or section 57, appeal therefrom to the Court to which orders made by such Magistrate are ordinarily appealable, and the order passed on such appeal shall be final.

Property when to vest in Government.

60. When an order for the confiscation of any property has been passed under section 55 or section 57, as the case may be, and the period limited by section 59 for an appeal from such order has elapsed, and no such appeal has been preferred, or when, on such an appeal being preferred, the Appellate Court confirms such order in respect of the whole or a portion of such property, such property or such portion thereof, as the case may be, shall vest in the Government free from all incumbrances.

Saving of power to release property seized.

61. Nothing hereinbefore contained shall be deemed to prevent any officer empowered in this behalf by the Local Government from directing at any time the immediate release of any property seized under section 52.

Punishment for wrongful seizure.

62. Any Forest-officer or Police-officer who vexatiously and unnecessarily seizes any property on pretence of seizing property liable to confiscation under this Act shall be punishable with imprisonment for a

term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

Penalty for counterfeiting or defacing marks on trees and timber and for altering boundary-marks.

63. Whoever, with intent to cause damage or injury to the public or to any person, or to cause wrongful gain as defined in the Indian Penal Code—

(a) knowingly counterfeits upon any timber or standing tree a mark used by Forest-officers to indicate that such timber or tree is the property of the Government or of some person, or that it may lawfully be cut or removed by some person; or

(b) alters, defaces or obliterates any such mark placed on a tree or on timber by or under the authority of a Forest-officer; or

(c) alters, moves, destroys or defaces any boundary-mark of any forest or waste-land to which the provisions of this Act are applied,

shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

Power to arrest without warrant.

64. (1) Any Forest-officer or Police-officer may, without orders from a Magistrate and without a warrant, arrest any person against whom a reasonable suspicion exists of his having been concerned in any forest offence punishable with imprisonment for one month or upwards.

(2) Every officer making an arrest under this section shall, without unnecessary delay and subject to the provisions of this Act as to release on bond, take or send the person arrested before the Magistrate having jurisdiction in the case, or to the officer in charge of the nearest police-station.

(3) Nothing in this section shall be deemed to authorise such arrest for any act which is an offence under Chapter IV unless such act has been prohibited under clause (c) of section 30.

Power to release on a bond a person arrested.

65. Any Forest-officer of a rank not inferior to that of a Ranger, who, or whose subordinate, has arrested any person under the provisions of section 64, may release such person on his executing a bond to appear, if and when so required, before the Magistrate having jurisdiction in the case, or before the officer in charge of the nearest police-station.

Power to prevent commission of offence.

66. Every Forest-officer and Police-officer shall prevent, and may interfere for the purpose of preventing, the commission of any forest-offence.

Power to try offences summarily.

67. The District Magistrate or any Magistrate of the first class specially empowered in this behalf by the Local Government may try summarily, under the Code of Criminal Procedure, 1898, any forest-offence punishable with imprisonment for a term not exceeding six months, or fine not exceeding five hundred rupees, or both.

Power to compound offences.

68. (1) The Local Government may, by notification in the local official Gazette, empower a Forest-officer—

(a) to accept from any person against whom a reasonable suspicion exists that he has committed any forest-offence, other than an offence specified in section 62 or section 63, a sum of money by way of compensation for the offence which such person is suspected to have committed, and

(b) when any property has been seized as liable to confiscation, to release the same on payment of the value thereof as estimated by such officer.

(2) On the payment of such sum of money, or such value, or both, as the case may be, to such officer, the suspected person, if in custody, shall be discharged, the property, if any, seized shall be released, and no further proceedings shall be taken against such person or property.

(3) A Forest-officer shall not be empowered under this section unless he is a Forest-officer of a rank not inferior to that of a Ranger and is in receipt of a monthly salary amounting to at least one hundred rupees, and the sum of money accepted as compensation under clause (*a*) of sub-section (1) shall in no case exceed the sum of fifty rupees.

Presumption that forest-produce belongs to Government.

69. When in any proceedings taken under this Act, or in consequence of anything done under this Act, a question arises as to whether any forest-produce is the property of the Government, such produce shall be presumed to be the property of the Government until the contrary is proved.

CHAPTER X.

CATTLE-TRESPASS.

Cattle-trespass Act, 1871, to apply.

70. Cattle trespassing in a reserved forest or in any portion of a protected forest which has been lawfully closed to grazing shall be deemed to be cattle doing damage to a public plantation within the meaning of section 11 of the Cattle-trespass Act, 1871, and may be seized and impounded as such by any Forest-officer or Police-officer.

Power to alter fines fixed under that Act.

71. The Local Government may, by notification in the local official Gazette direct that, in lieu of the fines fixed under section 12 of the Cattle-trespass Act, 1871, there shall be levied for each head of cattle impounded under section 70 of this Act such fines as it thinks fit, but not exceeding the following, that is to say :—

For each elephant	ten rupees
For each buffalo or camel	two ,,
For each horse, mare, gelding, pony, colt, filly, mule, bull, bullock, cow or heifer	one rupee
For each calf, ass, pig, ram, ewe, sheep, lamb, goat or kid ..	eight annas.

CHAPTER XI.

OF FOREST-OFFICERS.

Local Government may invest Forest-officers with certain powers.

72. (1) The Local Government may invest any Forest-officer with all or any of the following powers, that is to say :—

(*a*) power to enter upon any land and to survey, demarcate and make a map of the same ;

(*b*) the powers of a Civil Court to compel the attendance of witnesses and the production of documents and material objects ;

(*c*) power to issue a search-warrant under the Code of Criminal Procedure, 1898 ; and

(*d*) power to hold an inquiry into forest-offences, and, in the course of such inquiry, to receive and record evidence.

(2) Any evidence recorded under clause (*d*) of sub-section (1) shall be admissible in any subsequent trial before a Magistrate, provided that it has been taken in the presence of the accused person.

73. All Forest-officers shall be deemed to be public servants within the meaning of the Indian Penal Code. Forest-officers deemed public servants.

74. No suit shall lie against any public servant for anything done by him in good faith under this Act. Indemnity for acts done in good faith.

75. Except with the permission in writing of the Local Government, no Forest-officer shall, as principal or agent, trade in timber or other forest-produce, or be or become interested in any lease of any forest or in any contract for working any forest, whether in or outside British India. Forest-officers not to trade.

CHAPTER XII.

SUBSIDIARY RULES.

76. The Local Government may make rules— Additional powers to make rules.

(a) to prescribe and limit the powers and duties of any Forest-officer under this Act;

(b) to regulate the rewards to be paid to officers and informers out of the proceeds of fines and confiscation under this Act;

(c) for the preservation, reproduction and disposal of trees and timber belonging to Government, but grown on lands belonging to or in the occupation of private persons; and

(d) generally, to carry out the provisions of this Act.

77. Any person contravening any rule under this Act, for the contravention of which no special penalty is provided, shall be punishable with imprisonment for a term which may extend to one month, or fine which may extend to five hundred rupees, or both. Penalties for breach of rules.

78. All rules made by the Local Government under this Act shall be published in the local official Gazette, and shall thereupon, so far as they are consistent with this Act, have effect as if enacted therein. Rules when to have force of law.

CHAPTER XIII.

MISCELLANEOUS.

79. (1) Every person who exercises any right in a reserved or protected forest, or who is permitted to take any forest-produce from, or to cut and remove timber or to pasture cattle in, such forest, and every person who is employed by any such person in such forest, and Persons bound to assist Forest officers and Police-officers.

every person in any village contiguous to such forest who is employed by the Government, or who receives emoluments from the Government for services to be performed to the community,

shall be bound to furnish without unnecessary delay to the nearest Forest-officer or Police-officer any information he may possess respecting the commission of, or intention to commit, any forest-offence, and shall forthwith take steps, whether so required by any Forest-officer or Police-officer or not,—

(a) to extinguish any forest fire in such forest of which he has knowledge or information;

(b) to prevent by any lawful means in his power any fire in the vicinity of such forest of which he has knowledge or information from spreading to such forest,

and shall assist any Forest-officer or Police-officer demanding his aid—

(c) in preventing the commission in such forest of any forest-offence; and

(d) when there is reason to believe that any such offence has been committed in such forest, in discovering and arresting the offender.

(2) Any person who, being bound so to do, without lawful excuse (the burden of proving which shall lie upon such person) fails—

(a) to furnish without unnecessary delay to the nearest Forest-officer or Police-officer any information required by sub-section (1);

(b) to take steps as required by sub-section (1) to extinguish any forest fire in a reserved or protected forest;

(c) to prevent, as required by sub-section (1), any fire in the vicinity of such forest from spreading to such forest, or

(d) to assist any Forest officer or Police-officer demanding his aid in preventing the commission in such forest of any forest-offence, or when there is reason to believe that any such offence has been committed in such forest in discovering and arresting the offender;

shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

Management of forests the joint property of Government and other persons.

80. (1) If the Government and any person be jointly interested in any forest or waste-land, or in the whole or any part of the produce thereof, the Local Government may either—

(a) undertake the management of such forest, waste-land or produce, accounting to such person for his interest in the same; or

(b) issue such regulations for the management of the forest, waste-land or produce by the person so jointly interested as it deems necessary for the management thereof and the interests of all parties therein.

(2) When the Local Government undertakes under clause (a) of sub-section (1) the management of any forest, waste-land or produce, it may, by notification in the local official Gazette, declare that any of the provisions contained in Chapters II and IV shall apply to such forest, waste-land or produce, and thereupon such provisions shall apply accordingly.

Failure to perform service for which a share in produce of Government forest is enjoyed.

81. If any person be entitled to a share in the produce of any forest which is the property of Government or over which the Government has proprietary rights or to any part of the forest-produce of which the Government is entitled, upon the condition of duly performing any service connected with such forest, such share shall be liable to confiscation in the event of the fact being established to the satisfaction of the Local Government that such service is no longer so performed:

Provided that no such share shall be confiscated until the person entitled thereto, and the evidence, if any, which he may produce in proof of the due performance of such service, have been heard by an officer duly appointed in that behalf by the Local Government.

82. All money payable to the Government under this Act, or under any rule made under this Act, or on account of the price of any forest-produce, or of expenses incurred in the execution of this Act in respect of such produce, may, if not paid when due, be recovered under the law for the time being in force as if it were an arrear of land-revenue. Recovery of money due to Government.

83. (1) When any such money is payable for or in respect of any forest-produce, the amount thereof shall be deemed to be a first charge on such produce, and such produce may be taken possession of by a Forest officer until such amount has been paid. Lien on forest produce for such money.

(2) If such amount is not paid when due, the Forest-officer may sell such produce by public auction, and the proceeds of the sale shall be applied first in discharging such amount.

(3) The surplus, if any, if not claimed within two months from the date of the sale by the person entitled thereto, shall be forfeited to His Majesty.

84. Whenever it appears to the Local Government that any land is required for any of the purposes of this Act, such land shall be deemed to be needed for a public purpose within the meaning of section 4 of the Land Acquisition Act, 1894. Land required under this Act to be deemed to be needed for a public purpose under the Land Acquisition Act, 1894.

85. When any person, in accordance with any provision of this Act or in compliance with any rule made thereunder, binds himself by any bond or instrument to perform any duty or act, or covenants by any bond or instrument that he, or that he and his servants and agents will abstain from any act, the whole sum mentioned in such bond or instrument as the amount to be paid in case of a breach of the conditions thereof may, notwithstanding anything in section 74 of the Indian Contract Act, 1872, be recovered from him in case of such breach as if it were an arrear of land revenue. Recovery of penalties due under bond.

86. The enactments mentioned in the Schedule are hereby repealed to the extent specified in the fourth column thereof. Repeals.

THE SCHEDULE.

(*See section 86.*)

ENACTMENTS REPEALED.

Year. 1	No. 2	Short title. 3	Extent of repeal. 4
1878	VII	The Indian Forest Act, 1878.	So much as has not already been repealed.
1890	V	The Forest Act, 1890 ..	Do.

Year	No	Short title.	Extent of repeal.
1	2	3	4
1891	XII	The Amending Act, 1891 ..	So much of Part I of Schedule II as relates to the Indian Forest Act, 1878.
1901	V	The Indian Forest (Amendment) Act, 1901.	So much as has not already been repealed.
1911	XV	The Indian Forest (Amendment) Act, 1911.	Do.
1914	X	The Repealing and Amending Act, 1914.	So much of the Second Schedule as relates to the Indian Forest Act, 1878, the Forest Act, 1890, and the Indian Forest (Amendment) Act, 1901.
1918	I	The Indian Forest (Amendment) Act, 1918.	The whole.
1920	XXXVIII	The Devolution Act, 1920 ..	So much of Schedule I, Part I, as relates to the Indian Forest Act, 1878.

INDIAN LIGHTHOUSE ACT, 1927.

ACT NO. XVII OF 1927.

[*21st September, 1927.*

An Act to consolidate and amend the law relating to the provision, maintenance and control of lighthouses by the Government in British India.

WHEREAS it is expedient to consolidate and amend the law relating to the provision, maintenance and control of lighthouses by the Government in British India ; it is hereby enacted as follows :—

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called THE INDIAN LIGHTHOUSE ACT, 1927.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Governor General in Council may, by notification in the Gazette of India, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) " Customs-collector " means an officer of customs exercising the powers of a Customs-collector under the Sea Customs Act, 1878, and includes any person appointed by the Governor General in Council to discharge the functions of a Customs-collector under this Act ;

(b) " district " means an area defined as a district for the purposes of this Act under section 3 ;

(c) "general lighthouse" means any lighthouse which the Governor General in Council may, by notification in the Gazette of India, declare to be a general lighthouse for the purposes of this Act;

(d) "lighthouse" includes any light-vessel, fog-signal, buoy, beacon, or any mark, sign or apparatus exhibited or used for the guidance of ships;

(e) "local lighthouse" means any lighthouse which is not a general lighthouse;

(f) "local lighthouse authority" means a Local Government, local authority or other person having the superintendence and management of a local lighthouse;

(g) "owner" includes any part-owner, charterer, or mortgagee in possession and any agent to whom a ship is consigned;

(h) "port" means any port, as defined in the Indian Ports Act, 1908, to which that Act extends; and

(i) words and expressions used in this Act and not otherwise defined have the same meanings respectively as in the Indian Merchant Shipping Act, 1923.

Appointment of officers.

3. The Governor General in Council may, by notification in the Gazette of India,—

(a) define areas to be districts for the purposes of this Act;

(b) appoint a person to be the Superintendent of Lighthouses in each district;

(c) appoint a person to be the Chief Inspector of Lighthouses in British India; and

(d) appoint persons to be Inspectors of Lighthouses.

Advisory Committees.

4. (1) The Governor General in Council shall appoint a Central Advisory Committee and shall consult it in regard to—

(a) the erection or position of lighthouses or of any works appertaining thereto;

(b) additions to, or the alteration or removal of, lighthouses;

(c) the variation of the character of any lighthouse or of the mode of use thereof;

(d) the cost of any proposals relating to lighthouses; or

(e) the making or alteration of any rules or rates of dues under this Act.

(2) The Governor General in Council may, if he thinks fit, appoint an Advisory Committee for any district for the purpose of advising in regard to any of the matters specified in sub-section (1) in so far as the interests of the district are affected thereby.

(3) Advisory Committees shall consist of persons representing interests affected by this Act or having special knowledge of the subject-matter thereof.

GENERAL LIGHTHOUSES.

Management of general lighthouses by the Governor General in Council and delegation of management.

5. (1) The superintendence and management of all general lighthouses are vested in the Governor General in Council.

(2) The Governor General in Council may require any local lighthouse authority to undertake the superintendence and management of any general lighthouse situated in or adjacent to the local limits within which the authority exercises its powers, and shall pay to the authority such sums to defray the cost of superintendence and management as he may determine.

LOCAL LIGHTHOUSES.

Power to inspect local lighthouses.

6. (1) The Chief Inspector of Lighthouses may, at any time, and any Superintendent or Inspector of Lighthouses may, if authorised in this behalf by a general or special order in writing of the Governor General in Council, enter upon and inspect any local lighthouse and make such inquiries in respect thereof or of the management thereof as he thinks fit.

(2) Every person having the charge of, or concerned in the management of, any lighthouse, shall be bound to furnish to any officer authorised by or under sub-section (1) to inspect the lighthouse all such information regarding the same as the officer may require.

(3) Every local lighthouse authority shall furnish to the Governor General in Council all such returns and other information in respect of the lighthouses under its supervision and management, or of any of them, as he may require.

Control of local lighthouses by the Governor General in Council.

7. (1) If, after an inspection under section 6 or such other inquiry as he thinks fit, the Governor General in Council is satisfied that a direction under this sub-section is necessary or expedient for the safety, or otherwise in the interests, of shipping, he may direct any local lighthouse authority—

(a) to remove or discontinue or to refrain from moving or discontinuing any lighthouse under its superintendence and management or to make or refrain from making any variation in the character or mode of use of any such lighthouse, or

(b) to erect, place or maintain, or to refrain from erecting, placing or maintaining, any lighthouse within the local limits within which the local lighthouse authority exercises its powers.

(2) A local lighthouse authority shall not erect, place, remove or discontinue any lighthouse or vary the character or mode of use of any lighthouse, unless it has given to the Governor General in Council at least one month's notice in writing of its intention so to do:

Provided that, in cases of emergency, a local lighthouse authority may take such action as it deems necessary and shall give immediate notice of the same to the Governor General in Council and, so far as is possible, to all shipping approaching or in the vicinity of the lighthouse.

(3) If a local lighthouse authority—

(a) fails to comply with any direction made under sub-section (1), or

(b) fails to exercise or perform, or exercises or performs in an improper, inefficient or unsuitable manner, any power or duty relating to the superintendence or management of lighthouses conferred or imposed upon it by or under any law for the time being in force, or

(c) fails to make adequate financial provision for the performance of any such duty,

the Governor General in Council may, by order in writing, require the local lighthouse authority to comply with the direction, or to make arrangements to his satisfaction for the proper exercise of the power or performance of the duty, or to make financial provision to his satisfaction for the performance of the duty, as the case may be, within such period as he may specify.

(4) If the local lighthouse authority fails to comply with an order made under sub-section (3) within the specified period or within such

further time as the Governor General in Council may allow, the Governor General in Council may exercise the power or perform the duty or make the requisite financial provision, as the case may be, and the local lighthouse authority shall be liable to repay to the Governor General in Council any expenditure incurred by him in so doing.

Management of local lighthouses by the Governor-General in Council.

8. The Governor General in Council may, at the request of a local lighthouse authority, undertake the superintendence and management of any local lighthouse on its behalf, and the local lighthouse authority shall pay to the Governor General in Council such sums to defray the cost of superintendence and management as may be agreed.

LIGHT-DUES.

Levy and collection of light dues.

9. For the purpose of providing or maintaining or of providing and maintaining lighthouses for the benefit of ships voyaging to or from British India or between ports in British India, the Governor General in Council shall, subject to the provisions of this Act, cause light-dues to be levied and collected in respect of every ship arriving at or departing from any port in British India.

Rates of light-dues leviable.

10. (1) The Governor General in Council may, by notification in the Gazette of India, prescribe rates, not exceeding two annas per ton, at which light-dues shall be payable, and may prescribe different rates for different classes of ships, or for ships of the same class when in use for different purposes or in different circumstances.

(2) Light-dues payable in respect of a ship shall be paid by the owner or master of the ship on its arrival at, and on its departure from, any port in British India :

Provided that, if light-dues have been paid in accordance with the provisions of this Act in respect of any ship, no further dues shall become payable in respect of that ship for a period of thirty days from the date on which the dues so paid became payable.

(3) An order under sub-section (1) imposing, abolishing or varying light-dues shall not take effect till the expiration of thirty days from the day on which the order was notified in the Gazette of India.

Receipts for light-dues.

11. Light-dues shall be paid to the Customs-collector who shall grant to the person paying the same a receipt in writing specifying—

(a) the port at which the dues have been paid;

(b) the amount of the payment ;

(c) the date on which the dues became payable ; and

(d) the name, tonnage and other proper description of the ship in respect of which the payment is made.

Ascertainment of tonnage.

12. (1) For the purpose of the levy of light-dues, a ship's tonnage shall be reckoned as under the Merchant Shipping Acts for dues payable on a ship's tonnage, with the addition required under section 85 of the Merchant Shipping Act, 1894, with respect to deck cargo.

(2) In order to ascertain the tonnage of any ship for the purpose of levying light-dues, the Customs-collector may—

(a) if the ship is registered under any law for the time being in force in British India or under the law of any foreign country, in respect of which an Order in Council has been made under section 84 of the Merchant Shipping Act, 1894, that ships of that country shall be deemed to be of the tonnage denoted in their certificates of registry or other national papers (any such ship being hereafter in this section referred to as a registered ship), require the owner or master

or other person having possession of the ship's register or other papers denoting her tonnage to produce the same for inspection and, if such owner, master or other person refuses or neglects to produce the register or papers, as the case may be, or otherwise to satisfy the Customs-collector as to the tonnage of the ship, cause the ship to be measured and the tonnage to be ascertained ; or

(b) if the ship is not a registered ship and the owner or master fails to satisfy the Customs-collector as to the true tonnage thereof according to the mode of measurement prescribed by the law for the time being in force for regulating the measurement of registered ships, cause the ship to be measured and the tonnage thereof to be ascertained according to such mode.

(3) If any person refuses or neglects to produce any register or other papers or otherwise to satisfy the Customs-collector as to the true tonnage of any ship, when required to do so under this section, such person shall be liable to pay the expenses of the measurement of the ship and of the ascertainment of the tonnage, and, if the ship is a registered ship, shall further, on conviction by a Presidency Magistrate or Magistrate of the first class having jurisdiction in the port where the ship lies or in any port to which she may proceed be punishable with fine which may extend to one thousand rupees.

Recovery of light-dues, expenses and costs.

13. (1) If the owner or master of any ship refuses or neglects to pay to the Customs-collector on demand the amount of any light-dues or expenses payable under this Act in respect of the ship, the Customs-collector may seize the ship and the tackle, apparel and furniture belonging thereto, or any part thereof, and detain the same until the amount of the dues or expenses, together with the costs of the seizure and detention, is paid.

(2) If any part of such dues, expenses or costs remains unpaid after the expiry of five days following the date of the seizure, the Customs-collector may cause the ship or other thing seized to be sold, and with the proceeds of the sale may satisfy the dues, expenses or costs remaining unpaid, together with the costs of the sale, and shall repay the surplus, if any, to the person by whom the same were payable.

Refusal of port-clearance.

14. The officer whose duty it is to grant a port clearance for any ship shall not grant the port clearance until the amount of all light-dues, expenses and costs payable in respect of the ship under this Act and of any fines imposed thereunder has been paid, or until security for the payment thereof has been given to his satisfaction.

Determination of disputes as to liability for payment.

15. If any dispute arises as to whether light-dues, expenses or costs are payable in respect of any ship under this Act or as to the amount of such dues, expenses or costs, the dispute shall, on application made in this behalf by either of the disputing parties, be heard and determined by a Presidency Magistrate or Magistrate of the first class having jurisdiction at the place where the dispute arises, and the decision of such Magistrate shall be final.

Light-dues payable at one port recoverable at another.

16. (1) If the master of any ship in respect of which any light-dues are payable at any port causes the ship to leave such port without having paid the same, the Customs-collector at that port may by writing require the Customs-collector at any other port in British India to which the ship may proceed or in which she may be to recover the dues remaining unpaid.

(2) Any Customs-collector to whom such a requisition is directed shall proceed to levy such sum as if it were payable under this Act at the port at which he is the Customs-collector, and a certificate by the Customs-collector at the port at which the light-dues first became payable, stating the amount payable, shall be sufficient proof in any proceeding under section 13 or section 15 that such amount is payable.

Penalty for evading payment of light-dues.

17. (1) If the owner or master of a ship evades or attempts to evade the payment of any light-dues, expenses or costs payable in respect of the ship under this Act, he shall, on conviction by a Presidency Magistrate or Magistrate of the first class having jurisdiction in any port to which the vessel may proceed or in which she may be found, be punishable with fine which may extend to five times the amount of the sum payable.

(2) In any proceeding before a Magistrate in a prosecution under sub-section (1), any such certificate as is mentioned in sub-section (2) of section 16, stating that the owner or master has evaded such payment, shall be sufficient proof of the evasion, unless the owner or master shows to the satisfaction of the Magistrate that the departure of the vessel without payment of the sum was caused by stress of weather, or that there was lawful or reasonable grounds for such departure.

Exemption from payment of light dues.

18. The following ships shall be exempted from the payment of light-dues under this Act, namely:—

(*a*) any ship belonging to His Majesty or the Government or to a foreign Prince or State and not carrying cargo or passengers for freight or fares; and

(*b*) any ship of a tonnage of less than fifty tons;

and the Governor General in Council may, by notification in the Gazette of India, exempt any other ships or classes of ships or ships performing specified voyages from such payment, either wholly or to such extent only as may be specified in the notification.

Refund of excess payments.

19. Where light-dues have been paid in respect of any ship in excess of the amount payable under this Act, no claim to refund of such excess payment shall be admissible, unless it is made within six months from the date of each payment.

ACCOUNTS.

Accounts, etc.

20. (1) The Governor General in Council shall cause to be maintained a separate account of all amounts received by way of light-dues, expenses, costs and fines under this Act and of all expenditure incurred for the purposes of this Act, and shall cause such account to be laid before the Central Advisory Committee, as soon as possible, after the close of each financial year.

(2) The Governor General in Council shall cause to be laid before the Central Advisory Committee before the close of each financial year a statement of the estimated receipts under, and expenditure for the purposes of, this Act during the forthcoming year.

RULES.

Power to make rules.

21. (1) The Governor-General in Council may make rules consistent with this Act to carry into effect the purposes thereof.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:— .

(*a*) the powers and duties of the Chief Inspector of Lighthouses and of Superintendents and Inspectors of Lighthouses ;

(*b*) the procedure and conduct of business of Advisory Committees constituted under this Act ;

(*c*) the rate of travelling and subsistence allowance payable to members of Advisory Committees ; and

(*d*) the period in respect of which and the form in which the separate account referred to in sub-section (1) of section 20 shall be kept and the forms in which that account and the statement referred to in sub-section (2) of that section shall respectively be presented to the Central Advisory Committee.

REPEALS.

Repeals. 22. The enactments mentioned in the Schedule are hereby repealed to the extent specified in the fourth column thereof.

THE SCHEDULE.

(*See section 22.*)

ENACTMENTS REPEALED.

Year.	No.	Short title.	Extent of repeal.
1879	IX	The Burma Coast-lights Act, 1879	The whole.
1904	IX	The Madras Coast-lights Act, 1904.	Do.
1915	II	The Sind Coast-lights Act, 1915.	Do.

THE INDIAN SUCCESSION (AMENDMENT) ACT, 1927.

ACT NO. XVIII OF 1927.

[*21st September*, 1927.

An Act further to amend the Indian Succession Act, 1925, *and the Married Women's Property Act*. 1874.

WHEREAS it is expedient further to amend the Indian Succession Act, 1925, and the Married Women's Property Act, 1874, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title. 1. This Act may be called THE INDIAN SUCCESSION (AMENDMENT) ACT, 1927.

Amendment of sections 223 and 236, Act XXXIX of 1925. 2. In sections 223 and 236 of the Indian Succession Act, 1925, the words "nor, unless the deceased was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, to a married woman without the previous consent of her husband" shall be omitted.

Insertion of new section 10 In Act III of 1874. 3. After section 9 of the Married Women's Property Act, 1874, the following heading and section shall be inserted, namely:—

"VI.—*Husband's liability for Wife's breach of trust or devastation.*

10. Where a woman is a trustee, executrix or administratrix, either before or after marriage, her husband shall not, unless he acts or intermeddles in the trust or administration, be liable for any breach of trust committed by her, or for any misapplication, loss or damage to the estate of the deceased caused or made by her, or for any loss to such estate arising from her neglect to get in any part of the property of the deceased." Extent of husband's liability for wife's breach of trust or devastation.

THE PRESIDENCY-TOWNS INSOLVENCY (AMENDMENT) ACT, 1927.

ACT NO. XIX OF 1927.

[21st *September*, 1927.

An Act further to amend the Presidency-towns Insolvency Act, 1909, for certain purposes.

WHEREAS it is expedient further to amend the Presidency-towns Insolvency Act, 1909, for the purposes hereinafter appearing; it is hereby enacted as follows:—

1. This Act may be called THE PRESIDENCY-TOWNS INSOLVENCY (AMENDMENT) ACT, 1927. Short title.

2. To section 7 of the Presidency-towns Insolvency Act, 1909 (hereinafter referred to as the said Act), the following proviso shall be added, namely:— Amendment of section 7, Act III of 1909.

"Provided that, unless all the parties otherwise agree, the power hereby given shall, for the purpose of deciding any matter arising under section 36, be exercised only in the manner and to the extent provided in that section."

3. After sub-section (2) of section 15 of the said Act, the following sub-section shall be added, namely:— Amendment of section 15, Act III of 1909.

"(3) On the making of the order admitting his petition, a debtor shall—

(*a*) unless the Court otherwise directs, produce all his books of account, and

(*b*) file such lists of creditors and debtors and afford such assistance to the Court as may be prescribed,

failing which the Court may dismiss his petition.".

4. In sub-sections (4) and (5) of section 36 of the said Act, for the words "If, on the examination of any such person, the Court is satisfied," the words "If on his examination any such person admits" shall be substituted. Amendment of section 36, Act III of 1909.

5. After clause (*k*) of sub-section (2) of section 112 of the said Act, the following clause shall be inserted, namely:— Amendment of section 112, Act III of 1909.

"(*kk*) filing of lists of creditors and debtors and the affording of assistance to the Court by a petitioning debtor,"

THE BAMBOO PAPER INDUSTRY (PROTECTION) ACT, 1927.

ACT NO. XX OF 1927.

21st September, 1927.

An Act to amend the law relating to the fostering and development of the bamboo paper industry in British India.

WHEREAS it is expedient to amend the law relating to the fostering and development of the bamboo paper industry in British India; It is hereby enacted as follows:—

Short title.

1. This Act may be called the BAMBOO PAPER INDUSTRY (PROTECTION) ACT, 1927.

Amendment of Act VIII of 1894.

2. (1) In the Second Schedule to the Indian Tariff Act, 1894, there shall be made the amendments specified in the Schedule to this Act.

(2) The amendments made by sub-section (1) shall have effect up to the 31st day of March, 1932.

Retrospective effect in certain cases.

3. Printing Paper (excluding chrome, marble, flint, poster and stereo), containing no mechanical wood pulp, on which a duty has been paid at 15 per cent. *ad valorem* under item No. 99 of Schedule II to the Indian Tariff Act 1894, between the 21st of September, 1925, and the commencement of this Act, shall be deemed to have been liable to pay duty at one anna per pound under item No. 155 of that Schedule; and any deficiency between the duty which has been paid on such paper and the duty hereby made payable shall be deemed to be duty short-levied within the meaning of section 39 of the Sea Customs Act, 1878, and that Act shall apply accordingly.

Amendment of Act XXV of 1925.

4. The second item of the Schedule to the Bamboo Paper Industry (Protection) Act, 1925, is hereby repealed.

THE SCHEDULE.

AMENDMENTS TO BE MADE IN SCHEDULE II TO THE INDIAN TARIFF ACT, 1894.

(*See section 2.*)

For Items Nos. 155 and 156, the following shall be substituted, namely:—

155	PRINTING PAPER (excluding chrome, marble, flint, poster and stereo), all sorts which contain no mechanical wood pulp or in which the mechanical wood pulp amounts to less than 65 per cent. of the fibre content	Pound.	One anna.
156	WRITING PAPER—		
	(*a*) Ruled or printed forms (including letter paper with printed headings) and account and manuscript books and the binding thereof	Pound	One anna or 15 per cent. *ad valorem*; whichever is higher.
	(*b*) All other sorts	Pound	One anna.

THE INDIAN SECURITIES (AMENDMENT) ACT, 1927.

ACT NO. XXI OF 1927.

21st September, 1927.

An Act to amend the Indian Securities Act, 1920, *for certain purposes.*

WHEREAS it is expedient to amend the Indian Securities Act, 1920, for certain purposes hereinafter appearing; It is hereby enacted as follows :—

Short title.

1. This Act may be called the INDIAN SECURITIES (AMENDMENT) ACT, 1927.

Amendment of section 10, Act X of 1920.

2. (1) In sub-section (1) of section 10 of the Indian Securities Act, 1920 (hereinafter referred to as the said Act), after the word "lost" in both places where it occurs the word "stolen" shall be inserted, and after the word "loss" in both places where it occurs the word "theft" shall be inserted; and in sub-section (2) of the same section after the word "loss" the word "theft" shall be inserted.

(2) To the same section after sub-section (3) the following sub-section shall be added, namely :—

"(4) If at any time before the Government becomes discharged under the provisions of this Act from liability in respect of any security the whole of which is alleged to have been lost, stolen or destroyed, such security is found, any order passed in respect thereof under this section shall be cancelled."

Insertion of new section 18A in Act X of 1920.

3. After section 18 of the said Act the following section shall be inserted, namely :—

Discharge in respect of interest.

" 18A. Save as otherwise expressly provided in the terms of a Government security, no person shall be entitled to claim interest on any such security in respect of any period which has elapsed after the earliest date on which demand could have been made for the payment of the amount due on such security."

THE SOCIETIES REGISTRATION (AMENDMENT) ACT, 1927.

ACT NO. XXII OF 1927.

22nd September, 1927.

An Act further to amend the Societies Registration Act, 1860, *for certain purposes.*

WHEREAS it is expedient further to amend the Societies Registration Act, 1860, for certain purposes hereinafter appearing ; It is hereby enacted as follows :—

Short title.

1. This Act may be called the SOCIETIES REGISTRATION (AMENDMENT) ACT, 1927.

Amendment of section 20, Act XXI of 1860.

2. In the preamble to, and in section 20 of, the Societies Registration Act, 1860, after the words "the diffusion of useful knowledge" the words "the diffusion of political education" shall be inserted.

THE INDIAN TARIFF (COTTON YARN AMENDMENT) ACT, 1927.

ACT NO. XXIII OF 1927.

22nd September, 1927.

An Act further to amend the Indian Tariff Act, 1894, *in order to protect the manufacture of cotton yarn in British India.*

WHEREAS it is expedient further to amend the Indian Tariff Act, 1894, in order to protect the cotton textile industry in British India against competition in cotton yarn produced under industrial conditions which enable such yarn to be produced at a cost below that at which it can be produced in British India ; It is hereby enacted as follows :—

Short title.

1. This Act may be called the INDIAN TARIFF (COTTON YARN AMENDMENT) ACT, 1927.

Amendment of the Second Schedule to Act VIII of 1894.

2. (1) In Item No. 44 of the Second Schedule to the Indian Tariff Act, 1894 after the figure and words "5 per cent." the figure and words "or 1½ annas per pound, whichever is higher" shall be added.

(2) The amendment made by sub-section (1) shall have effect up to the 31st day of March, 1930.

THE INDIAN TARIFF (AMENDMENT) ACT, 1927.

ACT NO. XXIV OF 1927.

22nd September, 1927.

An Act further to amend the Indian Tariff Act, 1894.

WHRREAS it is expedient further to amend the Indian Tariff Act, 1894, in order to remove or reduce the customs duties on certain machinery and materials of industries; It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called the INDIAN TARIFF (AMENDMENT) ACT, 1927.

(2) It shall come into force on the 1st day of October, 1927.

Amendment of the Second Schedule, Act VIII of 1894.

2. In the Second Schedule to the Indian Tariff Act, 1894, there shall be made the amendments specified in the Schedule to this Act.

THE SCHEDULE.

(*See Section* 2.)

1. In Item No. 1A, for the word and figures "No 68" the words, letter and figures "Nos. 1B and 68" shall be substituted.

2. After Item No. 1A, the following item shall be inserted, namely :—

"1B | Sago flour."

3. After Item No. 6, the following heading and item shall be inserted, namely :—

"TALLOW, STEARINE AND WAX.

6A | Tallow"

4. After Item No. 8, the following item shall be inserted under the heading "MISCELLANEOUS", namely :—

"8A | China Clay."

5. After Item No. 13, the following item shall be inserted, namely :—

"13A | Bleaching paste and bleaching powder."

6. After Item No. 14, the following item shall be inserted namely :—

" 14A | Magnesium chloride."

and Item No. 14A shall be re-numbered 14B.

7. After Item No. 14B, the following heading and item shall be inserted, namely :—

"DYES AND COLOURS.

14C | Dyes derived from coal-tar and coal-tar derivatives used in any dyeing process."

8. After Item No. 18, the following heading and items shall be inserted, namely :—

"MACHINERY.

18A | MACHINERY, namely, such of the following articles as are not otherwise specified :—

(1) prime-movers, boilers, locomotive engines and tenders for the same, portable engines (including power-driven road rollers, fire engines and tractors), and other machines in which the prime-mover is not separable from the operative parts ;

(2) machines and sets of machines to be worked by electric, steam, water, fire or other power, not being manual or animal labour, or which before being brought into use require to be fixed with reference to other moving parts ;

(3) apparatus and appliances, not to be operated by manual or animal labour, which are designed for use in an industrial system as parts indispensable for its operation and have been given for that purpose some special shape or quality which would not be essential for their use for any other purpose ;

(4) control gear, self-acting or otherwise, and transmission-gear designed for use with any machinery above specified, including belting of all materials and driving chains, but excluding driving ropes not made of cotton ;

(5) bare hard-drawn electrolytic copper wires and cables and other electrical wires and cables, insulated or not ; and poles, troughs, conduits and insulators designed as parts of a transmission system, and the fittings thereof.

Note.—The term 'industrial system' used in sub-clause (3) means an installation designed to be employed directly in the performance of any process or series of processes necessary for the manufacture, production or extraction of any commodity.

18B | The following TEXTILE MACHINERY AND APPARATUS by whatever power operated, namely, healds, heald cords and heald knitting needles ; reeds and shuttles ; warp and weft preparation machinery and looms ; bobbins and pirns ; dobbies ; Jacquard machines ; Jacquard harness linen cords ; Jacquard cards ; punching plates for Jacquard cards ; warping mills ; multiple box sleys; solid border sleys; tape sleys; swivel sleys; tape looms; wool carding machines ; wool spinning machines ; hosiery machinery ; coir mat shearing machines ; coir fibre willowing machines ; heald knitting machines ; dobby cards ; lattices and lags for dobbies ; wooden winders ; silk looms ; silk throwing and reeling machines ; cotton yarn reeling machines ; sizing machines ; doubling machines ; silk twisting machines ; cone winding machines ; piano card cutting machines ; harness building frames ; card lacing frames ; drawing and denting hooks ; sewing thread balls making machines ; cumbli finishing machinery ; hank boilers ; cotton carding and spinning machines ; mail eyes, lingoes, comber boards and comber board

frames; take-up motions; temples and pickers; picking ban picking sticks; printing machines; roller cloth; clearer clot sizing flannel; and roller skins.

18C PRINTING AND LITHOGRAPHIC MATERIAL, namely: presses, a minium lithographic plates, composing sticks, chases, impos tables, lithographic stones, stereo-blocks, wood blocks, half-tc blocks, electrotype blocks, roller moulds, roller frames and stoc roller composition, standing screw and hot presses, perforating r chines, gold blocking presses, galley presses, proof presses, arm presses, copper plate printing presses, rolling presses, ruling r chines, ruling pen making machines, lead and rule cutters, t casting machines, type setting and casting machines, rule bend machines, rule mitreing machines, bronzing machines, stereotyp apparatus, paper folding machines, and paging machines, but cluding ink and paper.

18D COMPONENT PARTS OF MACHINERY, as defined in Nos. 18A, 1 and 18C, namely, such parts only as are essential for the work of the machine or apparatus and have been given for that purp some special shape or quality which would not be essential for th use for any other purpose:

Provided that articles which do not satisfy this condition shall a be deemed to be component parts of the machine to which tl belong if they are essential to its operation and are imported w it in such quantities as may appear to the Collector of Customs be reasonable."

9. After Item No. 24, the following items shall be inserted, namely:—

"24A | Ropes, cotton.

24B | Starch and farina."

10. After Item No. 43, under the heading "YARNS AND TEXTILE FABRIC the following item shall be inserted, namely:—

"43A | Artificial silk yarn and thread. | *Ad valorem* | 7½ per cent.

11. In Part III of the Schedule, the heading "MACHINERY," and It Nos. 51, 51A and 51B shall be omitted.

11A. For Item No. 54 the following shall be substituted, namely:—

54 | The following printing material, namely, type, leads, brass ru wooden and metal quoins, shooting sticks and galleys and m furniture.

12. For the second proviso to Item No. 63, the following shall be sub tuted, namely:—

"Provided also that articles of machinery as defined in No. 18A or No. 1 shall not be deemed to be included hereunder."

13. In the proviso to Item No. 64, for the figures and letter "51" and "5 the figures and letters "18A" and "18D" shall be substituted respectively.

14. In Item No. 68, after the word "FLOUR," the words, "except sago flo shall be inserted.

15. For Item No. 77, the following shall be substituted, namely:—

"77 | All sorts of stearine, wax, grease and animal fat not other specified."

16. In Item No. 92, after the word "sorts" where it occurs for the first ti the words 'not otherwise specified" shall be inserted.

17. In Item No. 96, the brackets, words and figures "(*see* Nos. 15, 16 and 51B)" shall be omitted.

18. In Item No. 103, for the figures "51" the figures and letter "18A" s be substituted.

19. In Item No. 106, after the word 'FIBRE" the words "not other specified" shall be inserted.

20. In Item No. 111, for the figures "51" the figures and letter "18A" shal bstituted.

21. Item No. 117 shall be omitted.

22. In Item No. 149A, the words, figures and letter "*see* Nos. 51 and 51A" shall be omitted.

23. In Item No. 153, for the figures and letter "51 51A" the figures and letters "18A, 18D" shall be substituted.

THE CRIMINAL LAW AMENDMENT ACT, 1927.

ACT NO. XXV OF 1927.

22nd September, 1927.

An Act further to amend the Indian Penal Code and the Code of Criminal Procedure, 1898, *for a certain purpose.*

WHEREAS it is expedient further to amend the Indian Penal Code and the Code of Criminal Procedure, 1898, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE CRIMINAL LAW AMENDMENT ACT, 1927.

Insertion of new section 295A in Act XLV of 1860.

2. After section 295 of the Indian Penal Code, the following section shall be inserted, namely:—

Deliberate and malicious acts intended to outrage religious feelings of any class, by insulting its religion or religious beliefs.

"295A. Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of His Majesty's subjects, by words, either spoken or written, or by visible representations, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Amendment of Act V of 1898.

3. In the Code of Criminal Procedure, 1898, the following amendments shall be made, namely:—

(*i*) in sub-section (1) of section 99A, after the words "His Majesty's subjects" the words "or which is deliberately and maliciously intended to outrage the religious feelings of any such class by insulting the religion or the religious beliefs of that class" shall be inserted, and after the figures and letter "153A" the words, figures and letter "or section 295A" shall be inserted;

(*ii*) in section 196, after the word, figures and letter "section 294A" the words, figures and letter "or section 295A" shall be inserted;

(*iii*) in the Second Schedule, after the entry relating to section 295 of the Indian Penal Code, the following entry shall be inserted, namely:—

295A	Maliciously insulting the religion or the religious beliefs of any class.	Shall not arrest without warrant.	Warrant.	Not bailable	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Court of Session or Presidency Magistrate;

and

(*iv*) in the same Schedule, for the entries in the third, fourth, fifth, sixth and eighth columns relating to section 296 of the Indian Penal Code, the following entries shall be substituted, respectively, namely :—

"May arrest without warrant.	Summons	Bailable	Not compoundable.	Presidency Magistrate or Magistrate of the first or second class"

THE CANTONMENTS (AMENDMENT) ACT, 1927.

ACT NO. XXVI OF 1927.

22nd September, 1927.

An Act further to amend the Cantonments Act, 1924, *for certain purposes.*

WHEREAS it is expedient further to amend the Cantonments Act, 1924, for the purposes hereinafter appearing ; It it is hereby enacted as follows :—

Short title.

1. This Act may be called THE CANTONMENTS (AMENDMENT) ACT, 1927.

Amendment of section 4, Act II of 1924.

2. In sub-section (1) of section 4 of the Cantonments Act, 1924 (hereinafter referred to as the said Act), the word "immediate" shall be omitted.

Amendment of section 20, Act II of 1924.

3. To sub-section (1) of section 20 of the said Act the following proviso shall be added, namely :—

"Provided that when a military officer holding the office of President ceases to be the Officer Commanding the Station merely by reason of a temporary absence from the station on duty or on station leave, or during the transfer of his headquarters to a hill station, he shall not vacate the office of President."

Amendment of section 34, Act II of 1924.

4. For sub-section (1) of section 34 of the said Act, the following shall be substituted, namely :—

"(1) The Local Government may remove from a Board any member thereof who—

(*a*) becomes subject to any of the disqualifications specified in sub-section (2) of section 27, or in sub-section (2) of section 28 ; or

(*b*) has absented himself for more than three consecutive months from the meetings of the Board and is unable to explain such absence to the satisfaction of the Board ; or

(*c*) has knowingly contravened the provisions of section 32 ; or

(*d*) being a legal practitioner, acts or appears on behalf of any other person against the Board in any legal proceedings or against the Secretary of State in Council in any such proceeding relating to any matter in which the Board is or has been concerned, or acts or appears on behalf of any person in any criminal proceeding instituted by or on behalf of the Board against such person."

Substitution of new section for section 35, Act II of 1924.

5. For section 35 of the said Act, the following section shall be substituted, namely :—

"35. (1) A member removed under clause (*b*) of sub-section (1) of section 34 shall, if otherwise qualified, be eligible for re-election or re-nomination. Consequences of removal.

(2) A member removed under clause (*c*) or clause (*d*) of sub-section (1) of section 34 shall not be eligible for re-election or nomination for the period during which, but for such removal, he would have continued in office.

(3) A member removed under sub-section (2) of section 34 shall not be eligible for re-election or nomination until the expiry of three years from the date of his removal."

6. To section 60 of the said Act the following proviso shall be added, namely :— Amendment of section 60, Act II of 1924.

"Provided that, where the previous sanction of the Governor General in Council is required to the imposition of any tax in a municipality, such sanction shall also be required to its imposition in a cantonment."

7. In sub-section (1) of section 65, after the word "tax," where it appears for the second time, the word "assessed" shall be inserted. Amendment of section 65, Act II of 1924.

8. In section 66, after the word "tax," the word "assessed" shall be inserted. Amendment of section 66, Act II of 1924.

9. In section 75 of the said Act, for the words "the tax payable thereon" the words " any tax assessed on the annual value thereof" shall be substituted. Amendment of section 75, Act II of 1924.

10. In section 76 of the said Act, for the words "the tax payable thereon" the words "any tax assessed on the annual value thereof and payable" shall be substituted. Amendment of section 76, Act II of 1924.

In section 77 of the said Act,— Amendment of section 77, Act II of 1924.

(*a*) for the words "the tax payable in respect of that year on the whole building," the words "any tax assessed on the annual value of the whole building and payable in respect of that year,". shall be substituted ; and

(*b*) in the proviso for the words "Provided that no such remission" the words "No remission or refund under section 75, section 76, or section 77" shall be substituted, and

the proviso, as so amended, shall be numbered as section 77A.

12. For sub-section (3) of section 107 of the said Act, the following shall be substituted, namely :— Amendment of section 107, Act II of 1924.

"(3) A Cantonment Authority may, from time to time, with the previous sanction of the Local Government, invest any portion of its cantonment fund in securities of the Government of India or in such other securities, including fixed deposits in banks, as the Local Government may approve in this behalf, and may dispose of such investments or vary them for others of a like nature."

13. In clause (*hh*) of sub-section (2) of section 280 of the said Act, for the words "of taxes may be made in respect" the words "may be made of taxes assessed on the annual value" shall be substituted. Amendment of section 280, Act II of 1924.

THE INDIAN EMIGRATION (AMENDMENT) ACT, 1927.

ACT NO. XXVII OF 1927.

22nd September, 1927.

An Act to amend the Indian Emigration Act, 1922, *for a certain purpose.*

WHEREAS it is expedient to amend the Indian Emigration Act, 1922, for the purpose hereinafter appearing ; It is hereby enacted as follows :—

Short title.

1. This Act may be called the INDIAN EMIGRATION (AMENDMENT) ACT, 1927.

Insertion of new clause in section 2, Act VII of 1922.

2. After clause (*c*) of sub-section (1) of section 2 of the Indian Emigration Act, 1922 (hereinafter referred to as the said Act), the following clause shall be inserted, namely :—

"(*cc*) 'emigrant ship' means any ship specially chartered for the conveyance of emigrants, or conveying emigrants exceeding a number to be prescribed :

Provided that the Governor-General in Council may, by notification in the Gazette of India, declare that ships conveying emigrants to any specified port shall not be deemed to be emigrant ships;"

Amendment of section 24, Act VII of 1922.

3. (1) In clause (*h*) of sub-section (2) of section 24 of the said Act, for the words "any ship specially chartered for the transport of emigrants" the words "emigrant ships" shall be substituted.

(2) In clause (*k*) of the said sub-section, for the words "both up to the date of their actual departure from India," the words "up to the date of their departure from India, during a voyage on an emigrant ship," shall be substituted.

THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1927.

ACT NO. XXVIII OF 1927.

22nd September, 1927.

An Act further to amend the Indian Income-tax Act, 1922, *for certain purposes.*

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922, for the purposes hereinafter appearing ; It is hereby enacted as follows :—

Short title.

1. This act may be called the INDIAN INCOME-TAX (AMENDMENT) ACT, 1927.

Amendment of section 59, Act XI of 1922.

2. (1) In section 59 of the Indian Income-tax Act, 1922, after sub-section (2), the following sub-section shall be inserted, namely :—

"(3) In cases coming under clause (*a*) of sub-section (2), where the income, profits and gains liable to tax cannot be definitely ascertained or can be ascertained only with an amount of trouble and expense to the assessee which, in the opinion of the Central Board of Revenue, is unreasonable, the rules made under that sub-section may—

(*a*) prescribe methods by which an estimate of such income, profits and gains may be made, and

(b) in cases coming under under sub-clause (i) of clause (a) of sub-section (2), prescribe the proportion of the income which shall be deemed to be income, profits and gains liable to tax,

and an assessment based on such estimate or proportion shall be deemed to be duly made in accordance with the provisions of this Act."

(2) Sub-sections (3) and (4) of the same section shall be re-numbered as sub-sections (4) and (5), respectively.

THE ADEN CIVIL AND CRIMINAL JUSTICE (HIGH COURT JURISDICTION AMENDMENT) ACT, 1927.

ACT NO. XXIX OF 1927.

23rd September, 1927.

An Act further to amend the Aden Civil and Criminal Justice Act, 1864, in order to make further provision for the jurisdiction thereunder of the High Court of Judicature at Bombay.

WHEREAS it is expedient further to amend the Aden Civil and Criminal Justice Act, 1864, in order to make further provision for the jurisdiction thereunder of the High Court of Judicature at Bombay; It is hereby enacted as follows :—

1. This Act may be called the ADEN CIVIL AND CRIMINAL JUSTICE (HIGH COURT JURISDICTION AMENDMENT) ACT, 1927. Short title.

2. In the first paragraph of section 8 of the Aden Civil and Criminal Justice Act, 1864 (hereinafter referred to as the said Act), after the word "suit," where it occurs for the first time, the words "or the hearing of an appeal in any suit" shall be inserted. Amendment of section 8, Act II of 1864.

3. After section 22A of the said Act the following section shall be inserted, namely :— Insertion of new section 22B in Act II of 1864.

"22B. An appeal shall lie to the High Court of Bombay against the judgment or order of the Resident or of an Additional Sessions Judge, where such an appeal is allowed by the Code of Criminal Procedure, 1898 : Appeals from Sessions Courts.

Provided that there shall be no appeal by a convicted person against a sentence of imprisonment not exceeding six months only, or of fine not exceeding five hundred rupees only."

4. For section 29 of the said Act the following section shall be substituted, namely :— Substitution of new section for section 29, Act II of 1864.

"29. (1) No appeal shall lie from a judgment or order of a Criminal Court except as provided in this Act. Appeal when allowed.

(2) An appeal against an acquittal may be made as provided in the Code of Criminal Procedure, 1898. Appeal against acquittal.

(3) It shall be at the discretion of the Resident to reserve, for the opinion of the High Court, any point of law arising in the course of any criminal proceedings whatever pending before him." Power to refer a point of law to High Court.

THE INDIAN DIVORCE (SECOND AMENDMENT) ACT, 1927.

ACT NO. XXX OF 1927.

23rd September, 1927.

An Act further to amend the Indian Divorce Act for a certain purpose.

WHEREAS it is expedient further to amend the Indian Divorce Act for the purpose hereinafter appearing ; It is hereby enacted as follows :—

Short title.

1. This Act may be called the INDIAN DIVORCE (SECOND AMENDMENT) ACT, 1927.

Amendment of section 2, Act IV of 1869.

2. In the second paragraph of section 2 of the Indian Divorce Act, after the word 'petitioner' where it first appears, the words 'or respondent' shall be inserted.

THE ASSAM LABOUR AND EMIGRATION (AMENDMENT) ACT, 1927.

ACT NO. XXXI OF 1927.

23rd September, 1927.

An Act further to amend the Assam Labour and Emigration Act, 1901, *for certain purposes.*

WHEREAS it is expedient further to amend the Assam Labour and Emigration Act, 1901, for certain purposes hereinafter appearing ; It is hereby enacted as follows :—

Short title.

1. This Act may be called the ASSAM LABOUR AND EMIGRATION (AMENDMENT) ACT, 1927.

Amendment of section 116E, Act VI of 1901.

2. For sub-section (2) of section 116E of the Assam Labour and Emigration Act, 1901 (hereinafter referred to as 'the said Act), the following sub-section shall be substituted namely :—

"(2) Such cess shall be payable on every person deputed by an employer to engage or assist persons to emigrate and on every person assisted to emigrate to a labour district :

Provided that the rates at which the cess is levied shall not exceed the following rates, namely :—

Five rupees a year on each person so deputed ; and

Five rupees on each person assisted to emigrate."

Validation of recoveries prior to commencement of this Act.

3. Where any sum has been paid as cess under section 116E of the said Act before the commencement of this Act, notwithstanding that it was not so payable, and such sum would have been payable if this Act had been in force at the time of the payment, such sum shall be deemed to have been legally due as cess, and no claim shall lie in any Court for its refund.

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Where the payment excluding the amount of the tax—

(i) is more than two annas but is less than six annas ..	Half an anna
(ii) is six annas or more but is less than twelve annas ..	One anna.
(iii) is twelve annas or more but is less than one rupee eight annas .	Two annas
(iv) is one rupee eight annas or more but is less than two rupees eight annas ..	Four annas.
(v) is two rupees eight annas or more but is less than three rupees eight annas ..	Eight annas.
(vi) is three rupees eight annas or more but is less than four rupees eight annas ..	Twelve annas.
(vii) is four rupees eight annas or more but is less than six rupees eight annas ..	One rupee.
(viii) is six rupees eight annas or more but is less than nine rupees eight annas ..	One rupee eight annas.
(ix) is nine rupees eight annas or more but is less than ten rupees . ..	Two rupees
(x) is ten rupees or more—for the first ten rupees and for every ten rupees or part of ten rupees over ten rupees ..	Two rupees

(4) On the application of the proprietor of any entertainment, the local authority may, subject to such general rules as may be framed in this behalf, compound the tax payable in respect of such entertainment for a consolidated payment.

(5) Where the place of entertainment is situated in the local area of one local authority but within five miles of the local area of another local authority where this Act is in force, the Local Government may, on the application of the latter authority and if satisfied that a substantial portion of the income is derived from its local area, direct that the entertainments tax be collected by either authority and the proceeds thereof be apportioned between them in such proportions as the Local Government may determine by general or special order or by rules made in this behalf.

Provided that if the Act is not in force in the local area in which the place of entertainment is situated the local authority of such area shall not be directed to collect the tax.

Admission of persons to entertainments subject to tax.

4. (1) No person shall be admitted for payment to any entertainment where the payment is subject to the entertainments tax except

(*a*) with a ticket stamped with an embossed or adhesive stamp (not previously used) issued by the Local Government and indicating the proper fee for such ticket; or

(*b*) in special cases with the approval of the local authority through a barrier which, or by means of a mechanical contrivance which automatically registers the number of persons admitted,

unless the proprietor of the entertainment has made arrangements approved by the local authority for furnishing returns of the payments for admission to the entertainment and has given security approved by the local authority for the payment of the entertainments tax.

(2) Nothing in sub-section (1) shall be deemed to preclude the local authority from requiring security from the proprietor of an entertainment for the payment of the entertainments tax in any other case.

Manner of payment of tax.

5. (1) The entertainments tax shall be charged in respect of each person admitted for payment and, in the case of admission by stamped ticket, shall be paid by means of the stamp on the ticket and in the

case of admissions otherwise than by stamped ticket, shall be calculated and paid on the number of admissions.

(2) Where the payment for admission to an entertainment is made by means of a lump sum paid as a subscription or contribution to any society, or for a season ticket or for the right of admission to a series of entertainments or to any entertainment during a certain period of time, the entertainments tax shall be paid on the amount of the lump sum, but where the local authority is of opinion that the payment of a lump sum or any payment for a ticket represents payment for other privileges, rights or purposes besides the admission to an entertainment or covers admission to an entertainment during any period during which the tax has not been in operation, the tax shall be charged on such an amount as appears to the local authority to represent the right of admission to entertainments in respect of which the entertainments tax is payable.

Penalty for non-payment of tax.

6. If any person is admitted for payment to any place of entertainment and the provisions of section 4 are not complied with, the proprietor of the entertainment to which such person is admitted shall, on conviction by a magistrate, be liable in respect of each such offence to a fine not exceeding two hundred rupees, and shall in addition be liable to pay any tax which should have been paid.

Entertainments exempted from payment of tax.

7. (1) The entertainments tax shall not be charged on payments for admission to any entertainment—

(a) which is of a wholly educational character; or

(b) which is provided partly for educational or scientific purposes by a society not conducted or established for profit; or

(c) which is provided by a society established solely for the purpose of promoting public health or the interest of agriculture or a manufacturing industry and not conducted for profit, and which entertainment consists solely of an exhibition of articles which are of material interest in connexion with questions relating to public health or agriculture or of the products of the industry for promoting the interests of which the society exists or of the materials, machinery, appliances, or foodstuffs used in the production of these products; or

(d) the whole of the net proceeds of which is devoted to philanthropic, religious or charitable purposes.

(2) Any dispute as to whether an entertainment is of the character referred to in any of the clauses of sub-section (1) shall be referred to the Local Government whose decision shall be final.

(3) The Local Government may by general order exempt any class of entertainment from liability to entertainments tax, and may, in consultation with the local authority concerned, by special order exempt any particular entertainment from liability to the tax. The local authority shall also have power to grant exemption in any other case subject to the sanction of the Local Government.

Manner of recovery of tax and fines under the Act.

8. (1) Any amount due on account of the entertainments tax may be recovered by the local authority in the same manner as the profession tax payable to such local authority.

(2) Any fine imposed under this Act or rules or by-laws made thereunder shall be recovered in the manner provided in the Code of Criminal Procedure for the recovery of fines and shall on recovery be

manufacture chargeable with duty under Part VII of the Second Schedule are being imported into British India at such a price as is likely to render ineffective the protection intended to be afforded by such duty to similar articles manufactured in India, he may, by notification in the *Gazette of India*, increase such duty to such extent as he thinks necessary.

(5) If the Governor-General in Council is satisfied, after such inquiry as he thinks necessary, that articles not of British manufacture chargeable under Part VII of the Second Schedule with a higher duty than similar articles of British manufacture are being imported into British India from any place outside India at such a price as is likely to render ineffective or excessive the protection intended to be afforded by such duty to similar articles manufactured in India, he may, by notification in the *Gazette of India*, increase or reduce such duty to such extent as he thinks necessary either generally or in respect of such articles when imported from or manufactured in any country or countries specified in the notification :

Provided that the duty leviable on any such article shall in no case be less than the duty leviable on a like article of British manufacture.

(6) The Governor-General in Council may, by notification in the *Gazette of India*, prescribe the conditions subject to which articles shall be deemed to be of British manufacture for the purposes of this section and of the Second Schedule."

(2) In the Second Schedule to the same Act there shall be made the amendments specified in the Schedule to this Act.

(3) The amendments made by this section other than those made in Parts I and II of the Second Schedule to the Indian Tariff Act, 1894, shall have effect only up to the 31st day of March 1934.

Statutory inquiry.

3. The Governor-General in Council shall, not later than the 31st day of March 1934, cause to be made, by such persons as he may appoint in this behalf, an inquiry as to the extent, if any, to which it is necessary to continue the protection of the steel industry in British India and as to the manner in which any protection found necessary should be conferred.

Repeal of Act XIV of 1924.

4. The Steel Industry (Protection) Act, 1924, is hereby repealed.

THE SCHEDULE.

AMENDMENTS TO BE MADE IN SCHEDULE II OF THE INDIAN TARIFF ACT, 1894.

(*See Section 2.*)

1. In Part I after item No. 20 the following item shall be inserted, namely :—

"20A	ZINC, unwrought, including cakes, ingots, tiles (other than boiler tiles), hard or soft slabs and plates, dust, dross and ashes ; and broken zinc."

2. In Part II—

(*a*) in the heading, after the words "liable to" the word "non-protective" shall be inserted; and

(*b*) after item No. 39 the following heading and item shall be inserted, namely :—

" METALS.

39A	TIN, block	Ton	Rs. 250."

3. For items Nos. 60, 61 and 62 and the heading thereto the following shall be substituted, namely :—

"METALS—IRON AND STEEL.

60. IRON alloys.
,, angle, channel and tee not otherwise specified (*see* No. 143).
,, bar and rod not otherwise specified (*see* No. 144).
,, pig.
,, rice bowls.

61. IRON OR STEEL anchors and cables.
,, ,, bolts and nuts, including hookbolts and nuts for roofing.
,, ,, hoops and strips.
,, ,, nails, rivets and washers, all sorts, not otherwise specified (*see* No. 145).
,, ,, pipes and tubes ; also fittings therefor, that is to say, bends, boots, elbows, tees, sockets, flanges, plugs, valves, cocks and the like, excluding pipes, tubes and fittings therefor otherwise specified (*see* No. 146).
,, ,, railway track material not otherwise specified (*see* Nos. 63 and 150) including bearing plates, cast iron sleepers and fastenings therefor, and lever boxes.
,, ,, tramway track material, not otherwise specified (*see* No. 150), including rails, fish-plates, tiebars, switches, crossings and the like materials of shapes and sizes specially adapted for tramway tracks.
,, ,, sheets (including cuttings, discs and circles) under ⅛ inch thick, whether fabricated or not, if coated with metals other than tin or zinc.
,, ,, plates and sheets (including cuttings, discs and circles) not under ⅛ inch thick, not otherwise specified (*see* Nos. 146, 147, 153 and 154), whether fabricated or not.
,, ,, barbed or stranded fencing-wire and wire-rope.
,, ,, (other than bar or rod) specially designed for the reinforcement of concrete.
,, ,, expanded metal.

62. STEEL, angle and tee if galvanized, tinned or lead-coated.
,, (other than bars), alloy, crucible, shear, blister and tub.
,, (other than bars), made for springs and cutting tools by any process.
,, ingots, blooms and billets, and slabs of a thickness of 1½ inches or more.
,, bar and rod, the following kinds—
(*a*) shapes specially designed for the reinforcement of concrete, if the smallest dimension is under ½ inch ;
(*b*) all shapes and sizes, if—
(i) of alloy, crucible, shear, blister or tub steel, or
(ii) galvanized or coated with other metals, or
(iii) planished or polished, including bright steel shafting ;
(*c*) other qualities, if of any of the following shapes and sizes—
(i) rounds under ½ inch diameter,
(ii) squares under ½ inch side,
(iii) flats, if under 1 inch wide and not over ½ inch thick,
(iv) flats not under 8 inches wide and not over ½ inch thick,
(v) ovals, if the dimension of the major axis is not less than twice that of the minor axis,
(vi) all other shapes, any size."

4. For item No. 63 and the heading thereto the following shall be substituted, namely :—

Qualifications of commissioners and their appointment.

12. (1) The commissioners of a Board shall be persons professing the Hindu religion.

(2) The President shall be—

(a) a barrister of England or Ireland or a member of the Faculty of Advocates in Scotland of not less than five years' standing, or

(b) a person having held judicial office not inferior to that of a Subordinate Judge or of a Judge of a Small Cause Court, or

(c) a person having been a pleader for a period of not less than ten years.

(3) Subject to the provisions of sub-sections (1) and (2), the President and other commissioners of a Board shall be appointed by the Local Government and shall, during their term of office, be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

Tenure of office of commissioners.

13. (1) Every commissioner of a Board other than the President shall be entitled to hold office for five years from the date of his appointment.

(2) The President shall be entitled to hold office for five years from the date of his appointment:

Provided that if on the date of his appointment as President he is a commissioner he shall be entitled to hold office as President only up to the expiry of his term as commissioner.

(3) An outgoing President or commissioner shall, if otherwise qualified, be eligible for reappointment.

Remuneration of commissioners.

14. (1) Every commissioner shall devote his whole time and attention to the duties of his office and shall not, without the sanction of the Local Government, engage in any other profession, trade or business, or stand for election or be appointed as a member of a local body or be a trustee of any religious endowment.

(2) The commissioners shall each receive, out of the funds of the Board, such salary as the Local Government may fix:

Provided that such salary shall not exceed one thousand and two hundred rupees per mensem for a President or eight hundred rupees per mensem for any other commissioner.

Power of Government to remove commissioners and their disqualification.

15. (1) The Local Government may suspend or remove any commissioner from his office—

(a) if he is convicted by a criminal court of any offence which in the opinion of the Local Government involves moral turpitude;

(b) if he becomes of unsound mind, or a deaf-mute or suffers from contagious leprosy;

(c) if he applies to be adjudicated or is adjudicated a bankrupt or insolvent;

(d) for corruption, misconduct or other sufficient cause.

(2) A commissioner shall cease to hold his office if he ceases to profess the Hindu religion.

Office and meetings of the Board.

16. (1) Every Board shall have an office at such place as the Local Government may fix for the transaction of business.

(2) At meetings of the Board, the President of the Board and in his absence the senior commissioner in order of appointment shall preside.

(3) No business shall be transacted at any meeting unless at least two commissioners are present.

(4) In case of difference of opinion among the commissioners, the question before the Board shall be decided by a majority of votes; and where the votes are equally divided the President or senior member presiding shall have a second or casting vote.

Officers and servants of the Board, their appointment and punishment.

17. Subject to such control as may be prescribed

(a) a Board may from time to time determine the number, designations, grades and scales of salary or other remuneration of its officers and servants; and

(b) the President of the Board shall have the power to appoint and transfer such officers and servants and may fine, reduce, suspend, remove or dismiss them for breach of rules or discipline, for carelessness, unfitness, neglect of duty or misconduct or other sufficient cause.

Powers and duties of the Board in general.

18. Subject to the provisions of this Act and of any scheme settled or deemed to be a scheme settled under this Act,

(1) the general superintendence of all religious endowments within the territorial jurisdiction of a Board shall vest in such Board, and

(2) the Board may do all things which are reasonable and necessary to ensure that maths and temples are properly maintained and that all religious endowments are properly administered and duly appropriated to the purposes for which they were founded or exist.

Power of Board to make by-laws.

19. (1) A Board may make by-laws not inconsistent with this Act or the rules made thereunder or with any other law as to—

(a) the division of duties among the President and commissioners of the Board;

(b) the manner in which their decision shall be ascertained otherwise than at meetings;

(c) the procedure and conduct of business at meetings of the Board;

(d) the delegation of powers of the Board to individual commissioners or committees of commissioners;

(e) the security, if any, to be furnished by officers and servants of the Board;

(f) the books and accounts to be kept at the office of the Board;

(*g*) the custody and investment of the funds of the Board, committees and trustees;

(*h*) the form and manner of applications to the Board;

(*i*) the details which shall be included in or excluded from the budgets of committees and religious endowments; and

(*j*) generally the conduct of all proceedings and business under this Act.

(2) No by-law or cancellation or alteration of a by-law made by the Board shall have effect until the same shall have been published for public criticism and thereafter confirmed by the Local Government.

(3) All by-laws when they shall have been duly confirmed shall be published in the *Fort St. George Gazette* and shall thereafter have the force of law.

CHAPTER III.—*Temple Committees.*

Constitution, variation and abolition of committees.

20. (1) The Local Government may, by notification,

(*a*) direct the constitution of a committee for any local area or any class or classes of institutions in any local area;

(*b*) vary the strength or the jurisdiction of any committee; or

(*c*) abolish any committee:

Provided as follows:—

(i) Not more than one committee shall have jurisdiction over the same temple or the endowments connected therewith.

(ii) The Local Government shall, before issuing a notification under clause (*b*) or clause (*c*), communicate to the Board and the committee concerned the grounds on which they propose to do so, fix a reasonable period for the Board or committee to show cause against the proposal and consider its explanations and objections, if any.

(2) The Board may pass such orders as it may deem fit as to the transfer or other disposal of the assets and liabilities of a committee which is varied or abolished.

Strength of committee.

21. A committee shall consist of such number of elected members as may be fixed by the Local Government, such number to be not less than six and not more than twelve.

Constitution of new committee.

22. Notwithstanding anything contained in section 21, where the Local Government direct the constitution of a committee for the first time or in place of a committee which has been abolished the members of such new committee shall hold office for such period not exceeding one year as the Local Government may fix and during such period may be all appointed by the Local Government.

Electoral areas and circles.

23. (1) For the purpose of election of members, the Local Government shall, for each committee, notify an electoral area.

(2) A committee may with the approval of the Board divide its electoral area into circles and determine the number of members which each circle shall return.

Electoral roll.

24. (1) For every electoral area, an electoral roll showing the names of persons qualified to vote shall once in every three years be prepared and published by such authority and in such manner as may be prescribed.

(2) Where an electoral area has been divided into circles, the electoral roll shall be divided into parts and one part shall be allotted to each circle.

(3) Every person whose name appears on the electoral roll published under this section shall, so long as it remains in force, be entitled to vote at an election; and no person whose name does not appear on such roll shall vote at an election.

(4) Notwithstanding anything contained in sub-section (1) an electoral roll once published shall remain in force till the publication of a fresh electoral roll.

Qualifications and disqualifications of electors.

25. Every person shall be entitled to have his name included in the electoral roll of an electoral area if he professes the Hindu religion and possesses the qualifications prescribed for an elector off such area in Part I of Schedule I and if he is not subject to any of the disqualifications described in Part II of Schedule I.

Disqualifications of candidates and members.

26. (1) A person shall be disqualified for election or appointment as a member of a committee—

(*a*) if his name does not appear on the roll of the electoral area concerned;

(*b*) if at the date of nomination, election or appointment he is

(i) of unsound mind, a deaf-mute or suffering from contagious leprosy, or

(ii) an undischarged insolvent, or

(iii) already a member of the committee whose term of office will not expire before his fresh election or appointment can take effect, or

(iv) a trustee or an office-holder or a servant attached to, or in receipt of any emolument or perquisite from a temple over which the committee has jurisdiction.

(2) A person who has been sentenced by a criminal court to transportation or to imprisonment for a period of more than six months (such sentence not having been cancelled or reduced to a period of not more than six months or the offence not having been pardoned) shall be disqualified for election or appointment as a member of a committee while undergoing the sentence or during the period for which such sentence may have been suspended or in abeyance and for five years from the date of expiration of the sentence;

Provided that the Local Government may direct that such sentence shall not operate as a disqualification.

(3) A member of a committee shall cease to hold his office if he—

(a) is sentenced by a court to such punishment as is described in sub-section (2):

Provided that the Local Government may direct that such sentence shall not operate as a disqualification;

(b) becomes of unsound mind, a deaf-mute or suffers from contagious leprosy;

(c) applies to be adjudicated or is adjudicated a bankrupt or insolvent;

(d) becomes trustee or an office-holder or a servant attached to, or in receipt of any emolument or perquisite from a temple over which the committee has jurisdiction;

(e) ceases to profess the Hindu religion; or

(f) absents himself from the meetings of the committee for three consecutive months, or if three consecutive meetings are not held within that period from three consecutive meetings.

(4) Where a person ceases to be a member under clause (f) of sub-section (3), the president of the committee shall report the fact to the committee at its next meeting and also intimate the same in writing to such person. If such person applies for restoration within one month of the receipt by him of such intimation from the president, the committee may, at the meeting next after the receipt of such application, restore him to his office of member of the committee:

Provided that a member of a committee shall not be so restored more than thrice during his term of office.

Term of office of members.

27. Save as otherwise expressly provided, every member of a committee shall be entitled to hold office for a term of five years from the date when his election or appointment is published in the prescribed manner.

President and vice president.

28. (1) Every committee shall elect a president and a vice-president from among its members.

(2) A president or a vice-president shall hold office for three years from the date of his election, unless in the meanwhile he resigns his office as president or vice-president or ceases to be a member of the committee.

(3) When the office of president is vacant, the vice-president shall exercise the functions of a president until a new president assumes office.

Resignation of president, vice-president and members of committee.

29. (1) A member of a committee other than the president and a vice-president may resign his office by giving notice in writing to the president and a president may resign his office by giving notice in writing to the committee.

(2) The resignation shall take effect in the case of a member or vice-president from the date of receipt of the notice by the president, and in the case of a president from the date on which it is placed before the committee.

Filling up of vacancies.

30. (1) On the occurrence of a vacancy in the office of a member of a committee, a new member shall, subject to the provisions of section 22, be elected in the same manner as his predecessor was elected.

(2) If no member is elected at an election held under sub-section (1), a fresh election shall be held.

(3) If no member is elected at such fresh election, the Local Government may appoint a person to fill the vacancy.

(4) If the office of president is vacant and there is no vice-president, any three members of the committee may, after giving reasonable notice of not less than seven clear days to the other members, convene a meeting for the election of the president.

(5) An outgoing member, president or vice-president shall, if otherwise qualified, be eligible for re-election or re-appointment.

(6) The election or appointment of a member, president or vice-president shall be notified in the prescribed manner.

Act of committee not to be invalidated by informality.

31. No act of a committee or of any person acting as president, vice-president or member of such committee shall be deemed to be invalid by reason only of a defect in the establishment or constitution of such committee or on the ground that any member of such committee was disqualified for, or had ceased to hold, such office, or by reason of such act having been done during the period of any vacancy in the office of president, vice-president or member of such committee.

Incorporation of committee.

32. Every committee shall, by such name as the Local Government may determine, be a body corporate and shall have perpetual succession and a common seal and shall, by the said name, sue and be sued.

Officers and servants of committee, their appointment and punishment.

33. (1) The committee may, from time to time, determine the number, designations, grades and scales of salary or other remuneration of its officers and servants.

(2) Subject to such control as the Board may impose, the president of the committee shall have the power to appoint and transfer such officers and servants, and may fine, reduce, suspend, remove or dismiss them for breach of rules or discipline, for carelessness, unfitness, neglect of duty or misconduct or other sufficient cause.

Powers and duties of the president.

34. The resolutions of a committee shall be carried into effect by its president in whom the entire executive power of the committee shall, save as hereinafter provided, be vested.

Committee to have general superintendence over temples.

35. Subject to the powers possessed by the Board under section 18 and to the provisions of any scheme settled or deemed to be a scheme settled under this Act, a committee shall be entitled to

exercise general superintendence over the temples for which it is constituted.

36. Subject to such control as may be prescribed, a committee may make regulations not inconsistent with this Act or with any rules or by-laws made thereunder in regard to the following matters;— Power of Committee to make regulations.

(a) the time and place of its meetings;

(b) the manner in which notice thereof shall be given;

(c) the quorum for the transaction of business at meetings;

(d) the preservation of order and the conduct of proceedings at meetings and the powers which a president may exercise for the purpose of enforcing his decisions;

(e) the manner in which the proceedings of meetings shall be recorded and published;

(f) the division of duties among the president, vice-president and members of the committee;

(g) the delegation of the powers, duties or functions of the committee or its president

(i) to the president or vice-president or a member, or

(ii) to a sub-committee of members;

(h) the persons by whom receipts may be granted for money paid to the committee;

(i) the accounts, returns and reports to be submitted by trustees of religious endowments;

(j) the manner in which the decisions of the committee shall be ascertained otherwise than at meetings;

(k) all other similar matters.

37. No committee constituted under the provisions of this chapter shall be entitled to exercise any jurisdiction over maths or excepted temples or the trustees thereof. Committee not to exercise jurisdiction over maths or excepted temples.

CHAPTER IV.—*Religious Endowments in general.*

38. (1) For every math and temple a register shall be maintained by the Board showing— Preparation of register of endowments.

(a) the names of past and present trustees and particulars as to the custom, if any, regarding succession to the office of trustee;

(b) particulars of all endowments of the math or temple, and all title-deeds and other documents relating thereto;

(c) particulars of the scheme of administration and of the *dittam* or scale of expenditure;

(d) the names of all offices to which any salary, emolument or perquisite is attached and the nature, time and conditions of service in each case;

(*e*) the jewels, gold, silver, precious stones, all vessels and utensils and other movables belonging to the institution, with their estimated value; and

(*f*) such other particulars as the Board may fix.

(2) The register shall be prepared, verified and signed by the trustee of the math or temple or by his authorized agent and submitted by him to the Board within such period after the commencement of this Act as the Board may fix:

Provided that a register relating to a temple over which a committee has jurisdiction shall be submitted through the committee which may, after making such inquiry as it may consider necessary, recommend such alterations, omissions or additions in the register as it may think fit.

(3) The Board may, after receiving the register from a trustee, make such inquiry as it may consider necessary and direct that the register be approved with such alterations, omissions or additions as it thinks fit to order.

(4) A copy of the register as approved by the Board shall be furnished to the trustee and to the committee, if any, concerned.

Annual verification of the register.

39. (1) The trustee or his authorized agent shall annually scrutinize the entries in the register and shall submit to the Board for its approval a verified statement showing the alterations, omissions or additions required therein.

(2) The Board and the committee, if any, may on receipt of the statement make such inquiry as they think necessary and the Board may by order direct the alterations, omissions or additions which should be made in the register.

(3) A copy of the order under sub-section (2) shall be communicated to the trustee and the president of the committee, if any, concerned and he shall carry out the alterations, omissions or additions ordered by the Board in the copy of the register kept by him.

Care required of trustee and his powers.

40. (1) The trustee of every religious endowment is bound to administer its affairs and to apply the funds and properties of such endowment in accordance with the terms of the trust, the usage of the institution and all lawful directions which a competent authority may issue in respect thereof, and as carefully as a man of ordinary prudence would deal with such affairs, funds or properties if they were his own.

(2) A trustee shall, subject to the provisions of this Act, be entitled to exercise all powers incident to the provident and beneficial management of the religious endowment and to do all things necessary for the due performance of the duties imposed on him.

Power of trustee of math or temple over trustees of specific endowments.

41. The trustee of specific endowments made for the performance of any service or charity connected with a math or temple shall perform such service or charity subject to the general superintendence of the trustee of the math or temple and shall obey all lawful orders issued by him.

42. (1) When a vacancy occurs in the office of hereditary trustee of a religious endowment and there is a dispute respecting the right of succession to such office, or Hereditary trustees.

when such vacancy cannot be filled up immediately, or

when a hereditary trustee is a minor and has no legally constituted guardian fit and willing to act as such or there is a dispute respecting the person who is entitled to act as such guardian, or

when a hereditary trustee is by reason of unsoundness of mind or other physical infirmity unable to discharge the functions of the trustee,

the Board in the case of maths and excepted temples and the committee in the case of other temples may appoint a fit person to discharge the functions of the trustee of such endowment, until another trustee succeeds to the office or the disability of the trustee ceases to exist, as the case may be.

Nothing in this sub-section shall be deemed to affect any thing contained in the Madras Court of Wards Act, 1902.

(2) In making an appointment under sub-section (1), the Board or committee shall have due regard to the claims of disciples, if any, in the case of maths, and of members of the family, if any, entitled to the succession, in the case of temples.

(3) The person so appointed shall be entitled to exercise all the powers which a trustee could exercise in relation to such endowment.

43. (1) All office-holders and servants attached to a temple or in receipt of any emolument or perquisite from the temple shall be under the orders and control of the trustee; and the trustee may fine, suspend, remove or dismiss any of them for breach of trust, incapacity, disobedience of lawful orders, neglect of duty, misconduct or other sufficient cause: Appointment and punishment of servants of temples.

Provided that the Local Government may, in respect of any specified hereditary office-holder or servant or class of hereditary office-holders or servants and subject to the provisions of S. 79, by order restrict and place under such control as they may think fit the exercise by the trustee of his powers of punishment under this sub-section.

(2) Any office-holder or servant of a temple other than an excepted temple punished by a trustee under sub-section (1) may, within such time as may be prescribed, appeal to the committee whose decision shall in the case of a non-hereditary office-holder or servant be final.

(3) A hereditary office-holder or servant of a temple other than an excepted temple may, within such time as may be prescribed, prefer a further appeal to the Board against the order of a committee on an appeal under sub-section (2) and the decision of the Board shall be final.

(4) Any office-holder or servant of an excepted temple punished by a trustee under sub-section (1) may, within such time as may be prescribed, appeal to the Board whose decision shall be final.

Enforcement of service when endowment is a charge on property.

44. Where an endowment for the performance of a charity or service connected with a temple consists merely of a charge on property and there is failure in the due performance of the charity or service by the person responsible, the trustee of the temple may require the person in possession of the property on which the endowment is a charge to pay to the trustee the expenses incurred or likely to be incurred in causing the charity or service to be performed otherwise. In default of such person making the payment as required by the trustee, the Court shall, on the application of the trustee, pass an order for the recovery of the amount and such order may be enforced as if it were a decree of such Court:

Provided that where the person in possession of the property on which the endowment is a charge is not the person responsible in law for the performance of the charity or service, and the amount referred to in this section is recovered from the person in possession, the Court shall, on the application of such person, pass an order for the recovery of the amount from the person responsible in law and such order may also be enforced as if it were a decree of such Court.

Maintenance of accounts and appointment of auditors.

45. (1) A Board, a committee and the trustee of a religious endowment shall keep regular accounts of receipts and disbursements.

(2) Such accounts shall be audited annually, or at such other intervals as may be prescribed, by auditors appointed by the Local Government. Auditors so appointed shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

Submission of audit report.

46. After completing the audit the auditor shall submit a report—

(a) to the Local Government in the case of the accounts of a Board,

(b) to the Board in the case of the accounts of a committee, math or excepted temple, and

(c) to the committee in the case of the accounts of temples over which it has jurisdiction.

Contents of the audit report.

47. (1) The report of the auditor shall among other things specify all cases of irregular, illegal or improper expenditure, or of failure to recover moneys or other property due to the institution, or of loss or waste of money or other property of the institution caused by neglect or misconduct.

(2) The auditor shall also report on any other matter which the Board or committee may require in respect of any specified religious endowment.

48. (1) The cost of auditing the accounts of maths and excepted temples shall be payable out of the funds of the Board and the cost of auditing the accounts of other temples out of the funds of the committee. Recovery of cost of audit from endowment funds.

(2) If, within the time fixed by the Local Government, the amount is not paid, the Local Government may recover it as if it were an arrear of land revenue.

CHAPTER V.—*Temples.*

49. The provisions of this chapter shall not apply to excepted temples or the trustees thereof. Chapter not to apply to excepted temples.

50. No person may succeed, or be appointed, to the office of trustee of a temple unless he professes the Hindu religion. Trustee to be Hindu.

51. (1) Subject to the provisions of sub-section (4) the number of non-hereditary trustees for any temple shall be fixed by the committee, but shall not exceed three. Non-hereditary trustees, their number and appointment.

(2) Non-hereditary trustees shall be appointed by the committee and in making such appointments the committee shall have due regard to the claims of persons belonging to the religious denomination for whose benefit the temple concerned is chiefly maintained.

(3) A non-hereditary trustee shall hold office for five years from the date of the order appointing him, unless in the meanwhile he is removed or dismissed, or his resignation is accepted, by the committee, or he ceases otherwise to be a trustee.

(4) Every non-hereditary trustee lawfully holding office on the date of commencement of this Act shall be deemed to have been duly appointed trustee under this Act on such date, but shall be entitled to hold office only for one year from such date.

52. The trustee of a temple shall be bound to obey all orders issued under the provisions of this Act by the Board or committee or the President of such Board or committee. Trustee to obey orders of committees.

53. (1) The committee may suspend, remove or dismiss the trustee of a temple— Removal and dismissal of trustees.

(*a*) for persistent default in the submission of budgets, accounts, reports or returns, or

(*b*) for wilful disobedience of lawful orders issued by the Board or committee, or the President of such Board or committee, or

(*c*) for any malfeasance, misfeasance, breach of trust, or neglect of duty in respect of the trusts, or

(*d*) for any misappropriation of, or improper dealing with the properties of the temple of which he is trustee, or

(*e*) for unsoundness of mind or other physical infirmity which unfits him for discharging the functions of a trustee.

(2) When the committee proposes to take action under sub-section (1) it shall frame charges against the trustee concerned and give him an opportunity of explanation, of testing the evidence against him and of adducing evidence in his favour and may place the trustee under suspension pending the disposal of the charges framed. The order of suspension, removal or dismissal shall state the charges framed against the trustee, his explanation and the finding of the committee on each charge with the reasons therefor.

(3) A trustee suspended, removed or dismissed under this section may, within three months of the date of the communication of the order of suspension, removal or dismissal, appeal to the Board against such order:

Provided that a hereditary trustee may, in lieu of appealing to the Board, apply within the same period to the Court to modify or cancel the order of the committee.

(4) The order of the committee under this section shall, when no appeal is preferred or application made under sub-section (3), be final; and when such appeal is preferred or application is made the order of the Board or the Court, as the case may be, shall be final.

Disqualifications of trustees.

54. (1) A non-hereditary trustee shall cease to hold his office if he—

(*a*) is sentenced by a Court to such punishment as is described in sub-section (2) of section 26 and subject to the proviso contained therein;

(*b*) applies to be adjudicated or is adjudicated a bankrupt or insolvent; or

(*c*) ceases to profess the Hindu religion.

(2) A hereditary trustee shall cease to hold his office if he ceases to profess the Hindu religion.

(3) If a hereditary trustee becomes subject to any of the disqualifications described in clause (*a*) or clause (*b*) of sub-section (1), the committee may supersede him and appoint a fit person to administer the temple until the disability of the trustee ceases to exist or another trustee succeeds to the office.

(4) The Board shall, in cases of dispute or doubt, determine whether a trustee is disqualified under this section and its decision shall be final.

Fixing of standard scale of expenditure in temples.

55. Subject to the provisions of any scheme settled or deemed to be a scheme settled under this Act—

(1) the trustee of a temple may from time to time submit to the committee proposals for fixing the *dittam* or scale of expenditure in the temple and the amounts which should be allotted to the various objects or ceremonies connected with such temple or the proportions in which the income or other property of the temple may be applied to such objects or ceremonies.

(2) The trustee shall publish such proposals at the temple and in such other manner as the committee may direct, together with a notice stating that, if within one month from the date of such publication any objection or suggestion is received from any person having interest, the committee will consider such objection or suggestion.

(3) After the expiry of the period fixed under sub-section (2), the committee shall consider the objections or suggestions that may have been received and may pass such orders as it thinks fit on the proposals.

(4) The trustee or any person having interest may within six months of the date of the order passed by the committee under sub-section (3) either appeal to the Board against such order or institute in the Court a suit to modify or set aside the same.

If such an appeal is preferred or such a suit is instituted the Board or the Court shall give at the expense of the appellant or the plaintiff, as the case may be, notice of the appeal or of the institution of the suit to all persons having interest either by personal service or where from the number of persons or any other cause such service is not reasonably practicable by public advertisement as the Board or Court may in each case direct.

(5) Subject to the result of such appeal or suit as is referred to in sub-section (4) the order of the committee shall be final. The order of the Board on appeal shall be final.

(6) The *dittam* or scale of expenditure for the time being in force in a temple shall not be altered by the trustee except in accordance with the procedure laid down in this section.

Budgets of temples.

56. (1) The trustee of every temple shall in each year submit to the committee before such date and in such form as the Board may require, a budget showing the probable receipts and disbursements of the temple and the endowments connected therewith during the following year.

(2) Every such budget shall make adequate provision for the *dittam* or scale of expenditure for the time being in force and the due discharge of all liabilities in respect of loans.

(3) The committee may within such time after the receipt of the budget as the Board may fix, direct the trustee to make such alterations, omissions or additions in the budget as it may think fit.

(4) The trustee may, within such time as the Board may fix, appeal against the order of the committee under sub-section (3) to the Board whose decision shall be final.

Schemes for non-excepted temples.

57. (1) When the Board is satisfied that, in the interests of the proper administration of the endowments of a temple, a scheme of administration should be settled, the Board may, after consulting in the prescribed manner the trustee, the committee, if any, and the persons having interest, by order settle a scheme of administration for the endowments of such temple.

(2) The Board may by order and in the manner provided in sub-section (1) modifiy or cancel a scheme settled under that sub-section.

(3) Every order of the Board under this section shall be published in the prescribed manner.

The trustee or any person having interest may within six months of the date of such publication institute a suit in the Court to modify or set aside such order. Subject to the result of such suit every order of the Board shall be final and binding on the committee, the trustee and all persons having interest

(4). Any scheme of administration which has been settled by a Court under this section or which under section 75 is deemed to be a scheme settled under this Act may, at any time, for sufficient cause be modified or cancelled by the court in a suit instituted by the Board or the trustee or any person having interest, but not otherwise.

Filling up of vacancies among office holders or servants.

58. (1) Vacancies amongst the office-holders or servants of a temple shall be filled up by the trustee in cases where the office or service is not hereditary.

(2) In cases where the office or service is hereditary, the next in the line of succession shall be entitled to succeed:

Provided that, if there is a dispute respecting the right of succession to such office or service, or in cases where such vacancy cannot be filled up immediately, or where the person entitled to succeed is a minor without a legally constituted guardian fit and willing to act as such, or where the hereditary office-holder or servant is by reason of unsoundness of mind or other physical infirmity unable to discharge the functions of the office or perform the service, the trustee may appoint a fit person to discharge the duties of the office or perform the service, until another person succeeds to the office or service or the disability of the office-holder or servant ceases to exist, as the case may be.

(3) In making an appointment under the proviso to sub-section (2), the trustee shall have due regard to the claims of members of the family, if any, entitled to the succession.

Trustees to furnish accounts, etc., to committee or Board.

59. The trustee of every temple shall furnish such accounts, returns, reports or other information relating to the administration of the temple in his charge and at such time and in such form as the committee or Board may require.

Inspection by president or member of endowments.

60. The president or any member of the committee deputed by him in this behalf may inspect all movable and immovable property belonging to, and all records, correspondence, plans, accounts and other documents relating to any temple, and the trustee of such temple and all officers and servants working under him shall afford to the president or such member such assistance as may be necessary.

CHAPTER VI.—*Maths and excepted temples.*

61. The trustee of every math and excepted temple shall in each year submit to the Board before such date and in such form as the Board may require— Submission of budgets and annual accounts.

(*a*) a budget showing the probable receipts and disbursements of the following year, and

(*b*) a statement of the actual receipts and disbursements of the previous year.

62. When the Board has reason to believe that the trustee of a math or excepted temple has been mismanaging the endowments of such math or temple or has been spending or alienating them for improper purposes, or when not less than twenty persons having interest make an application to the Board stating that in the interests of the proper administration of such endowments a scheme of administration should be settled, the Board may hold an inquiry which shall be conducted in such manner as may be prescribed. Inquiry by Board into mismanagement by trustees.

63. (1) If after making the inquiry referred to in section 62 the Board is satisfied that the trustee concerned has mismanaged the endowments of such math or temple or has spent or alienated them for improper purposes, or that, in the interests of the proper administration of such endowments, a scheme of administration should be settled, the Board may, after consulting in the prescribed manner the trustee and the persons having interest, by order settle a scheme of administration for the endowments connected with such math or temple. Schemes for maths and excepted temples.

(2) If in settling a scheme for the administration of the endowments connected with a math, the Board considers it necessary to associate any person with, or constitute any separate body for participating or assisting in the administration of such endowments, such person shall be a person having interest and such body shall consist exclusively of persons having interest in such math.

(3) The Board may at any time by order and in the manner provided in sub-section (1) modify or cancel a scheme settled under that sub-section.

(4) Every order of the Board under this section shall be published in the prescribed manner.

The trustee or any person having interest may within six months of the date of such publication institute a suit in the court to modify or set aside such order.

64. Every order of the Board, under section 63 shall, subject to the result of any suit which may be instituted under sub-section (4) of that section, be final and binding on the trustee and all persons having interest. Finality of Board's order.

65. Any scheme of administration which has been settled by a court under section 63 or which under section 75 is deemed to be a scheme settled under this Act may, at any time, for suffi- Modification or cancellation of schemes.

cient cause be modified or cancelled by the court in a suit instituted by the Board or the trustee or any person having interest but not otherwise.

CHAPTER VII. *Application of Endowment Funds.*

Authority of trustee to incur expenditure on health, etc., of pilgrims and worshippers.

66. The trustee of a math or temple may, out of the funds of the endowments in his charge, after satisfying adequately the purposes of the endowments, incur expenditure on arrangements for securing the health, safety, or convenience of disciples, pilgrims or worshippers resorting to such math or temple:

Provided that the Board in the case of maths and excepted temples and the committee in the case of other temples may, for reasons to be set forth in writing, restrict and place under such control as they may think fit the exercise by the trustee of his discretion under this section.

Cypres application of endowment or surplus.

67. (1) The Board may, after holding an inquiry in such manner as may be prescribed, by order, declare that the purpose of a religious endowment has from the beginning been, or has subsequently become, impossible of realization or that the machinery for effectuating the original purposes of the endowment has failed or no longer exists, or that after satisfying adequately the purposes of the endowment and after setting apart a sufficient sum for the repair and renovation of the buildings connected with the math or temple or the endowments attached thereto there is a surplus which is not required for such purposes; and may, by such order, direct that the amount of the endowment or such surplus as is declared to be available, as the case may be, be appropriated to religious, educational or charitable purposes not inconsistent with the objects of such math or temple.

Provided that in the case of a temple founded and maintained by a community the amount of the endowment or the surplus shall, as far as possible, be utilized for the benefit of the community for the purposes mentioned above.

(2) It shall be competent to the Board when giving a direction under sub-section (1) to determine what portion of such amount or surplus shall be retained as a reserve fund for the math or temple and to direct the remainder to be appropriated to the purposes specified in that sub-section.

(3) The Board may at any time by order and in the manner provided in sub-section (1) modify or cancel an order passed under that sub-section.

(4) The order of the Board under this section shall be published in the prescribed manner. The trustee or any other person having interest may within six months of the date of such publication institute a suit in the court to modify or set aside such order.

Subject to the result of such suit the order of the Board shall be final and binding on the committee, if any, the trustee and all persons having interest.

(5) Any decision of the court under this section may, at any time, for sufficient cause be modified or cancelled by the court in a suit instituted by the Board or the trustee or any person having interest but not otherwise.

CHAPTER VIII.—*Finance.*

Recovery from endowment of expenses incurred by the Board or committee on legal proceedings.

68. All costs and expenses incurred in connexion with legal proceedings in respect of any religious endowment to which a Board or committee is a party shall, notwithstanding anything contained in section 74, be payable out of the funds of such endowment.

Annual Contribution from endowments to the Board and commitee.

69. (1) Every math and temple shall pay annually for meeting the expenses of the Board such contribution not exceeding one and a half per centum of its income as the Board may determine.

(2) Every temple other than an excepted temple shall pay annually for meeting the expenses of the committee such contribution not exceeding one and a half per centum of its income as the committee may with the approval of the Board determine.

(3) Religious endowments the administration of which is governed by a scheme settled under section 92 of the Code of Civil Procedure, 1908, shall, notwithstanding anything to the contrary contained in such scheme, be liable to pay the contribution under this section.

Assessment and recovery of costs, expenses and contributions.

70. (1) The costs, expenses and contributions payable under sections 68 and 69 shall be assessed on and notified to the trustee of every math and temple in the prescribed manner.

Where the contribution or a portion of the contribution has to be paid by a specific endowment, the same shall be assessed on and notified to the trustee of the specific endowment also.

(2) Such trustee shall, within three months of his receipt of such notice or within such further time as may be granted by the Board or committee, pay out of the funds of the math or temple concerned the amount so demanded to the President of the Board or committee, as the case may be, or to any person authorized by him; and, in default of his doing so, the court shall, on the application of the President of the Board or committee, recover the amount as if a decree had been passed for the amount by the court against the religious endowment concerned:

Provided that the court may for reasonable cause postpone the recovery of the amount or order payment thereof in instalments.

CHAPTER IX.—*Miscellaneous.*

Power of Local Government to make rules.

71. (1) The Local Government may make rules to carry out all or any of the purposes of this Act not inconsistent therewith.

(2) In particular, and without prejudice to the generality of the foregoing power, they shall have power to make rules with reference to the following matters:—

(a) all matters expressly required or allowed by this Act to be prescribed;

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(*b*) the registration of electors;

(*c*) the nominations of candidates, the times of election, the mode of recording and counting votes and the declaration and publication of the results of elections;

(*d*) the conduct of inquiries and the decision of disputes relating to elections;

(*e*) the powers of the President and commissioners of a Board to hold inquiries, to summon and examine witnesses and to compel the production of documents;

(*f*) the grant of leave, leave allowances and travelling allowances to the President and commissioners of a Board and generally the conditions of service of such President and commissioners;

(*g*) the budgets, reports, accounts, returns or other information to be submitted by Boards;

(*h*) the qualifications for officers and servants of a Board, the grant of leave, leave allowances and travelling allowances to them, the establishment of provident funds for them and generally the conditions of their service;

(*i*) the organization of a staff of auditors, their salaries and allowances, the control of such staff, its relations with Boards, committees and trustees and generally the conditions of service of auditors;

(*j*) the calculation of the cost of audit and its apportionment among Boards and committees;

(*k*) the manner in which the accounts of Boards, committees or endowments shall be audited and published, the time and place of audit and the form and contents of the auditor's report; and

(*l*) the method of calculating the income of a religious endowment.

(3) The power to make rules under this section shall be subject to the condition of previous publication.

Power to alter schedules.

72. (1) The Local Government may make rules altering, adding to, or cancelling any of the schedules to this Act.

(2) All references made in this Act to any of the aforesaid schedules shall be construed as referring to such schedules as amended in exercise of the powers conferred by sub-section (1).

(3) A draft of the rules proposed to be made under this section shall be laid on the table of the Legislative Council and the rules shall not be made unless the Legislative Council by resolution approves the draft either without modification or addition or with modifications or additions; but upon such approval being given, the rules may be made in the form in which they have been approved, and such rules on being so made shall be notified and shall thereafter be of full force and effect.

Suits.

73. (1) The Board or committee having jurisdiction over any math or temple or any person having interest and having

obtained the consent of the Board may institute a suit in the Court to obtain a decree—

(a) appointing or removing the trustee of a math or excepted temple,

(b) vesting any property in a trustee,

(c) declaring what proportion of the endowed property or of the interest therein shall be allocated to any particular object of the endowment, or

(d) granting such further or other relief as the nature of the case may require.

(2) Sections 92 and 93 and rule 8 of Order I of the first schedule of the Code of Civil Procedure, 1908, shall have no application to any suit claiming any relief in respect of the administration or management of a religious endowment and no suit in respect of such administration or management shall be instituted except as provided by this Act.

Cost of suits etc.

74. The costs, charges and expenses of and incidental to any suit or application under this Act or to any appeal from a decree or order passed in such suit or on such application shall be in the discretion of the Court, which may subject to the provisions of S. 68 direct the whole or any part of such costs, charges and expenses to be met from the property or income of the endowment concerned or to be borne and paid in such manner and by such persons as it thinks fit.

Schemes settled under section 92 of the Civil Procedure Code.

75. Where the administration of a religious endowment is governed by any scheme settled under section 92 of the Code of Civil Procedure, 1908, such scheme shall, notwithstanding any provisions of this Act which may be inconsistent with the provisions of such scheme, be deemed to be a scheme settled under this Act; and such scheme may be modified or cancelled in the manner provided by this Act.

Alienation of immovable trust property.

76. (1) No exchange, sale or mortgage and no lease for a term exceeding five years of any immovable property belonging to any math or temple shall be valid or operative unless it is necessary or beneficial to the math or temple and is sanctioned by the Board in the case of maths and excepted temples and by the committee in the case of other temples.

(2) The trustee of the math or temple or any person having interest may, within one year of the date of the order of the Board or committee under Sub-section (1), apply to the court for modifying or cancelling such order.

(3) The order of the Board or committee under sub-section (1) when no application is made under sub-section (2) and the order of the court when such application is made shall be final.

Application of the Act to endowments partly religious and partly secular.

77. (1) Where an endowment has been made or property given for the support of an institution which is partly of a religious and partly of a secular character or for the performance of any service or charity connected therewith, or

where an endowment made or property given is appropriated partly to religious and partly to secular uses, the Board may notwithstanding anything contained in the Madras Endowments and Escheats Regulation, 1817, determine what portion of such endowment or property or of the income therefrom shall be allocated to religious uses. Such portion shall thereafter be deemed to be a religious endowment and its administration shall be governed by the provisions of this Act.

(2) Any party affected by an order under sub-section (1) may within such time as may be prescribed apply to the Court to modify or set aside such order but, subject to the result of such application, the order of the Board shall be final.

Putting trustee in possession

78. Where a committee has appointed a person as non-hereditary trustee of a temple or where a Board or committee has appointed a person to discharge the functions of a hereditary trustee and such person is resisted in, or prevented from, obtaining possession of the math or temple or of the endowments connected therewith or of any title-deeds or other documents relating thereto, the court may, on application by the person so appointed and on production of the order of the Board or committee appointing him, order the delivery to such person the possession of such property as may be specified therein.

Saving of established customs and usages.

79. Save as otherwise expressly provided in or under this Act nothing herein contained shall affect any established usage of a math or temple or the rights, honours, emoluments and perquisites to which any person may by custom or otherwise be entitled in such math or temple.

Government not to interfere with religious endowments except as provided by this Act.

80. Save as provided in this or any other Act, it shall not be lawful for the Local Government or for any executive officer of the Local Government in his official capacity to undertake or assume the superintendence of any land or other property granted for the support of, or otherwise belonging to, any math or temple, to take any part in the management or appropriation of any endowment made for its maintenance, or to nominate or appoint the trustee of any religious endowment or to be concerned in any way with any religious endowment.

Court-fees leviable on documents under this Act.

81. (1) Notwithstanding anything contained in the first or second schedule to the Madras Court-Fees Amendment Act, 1922, the proper fees for the documents described in columns 1 and 2 of Schedule II shall be the fees indicated in column 3 thereof.

(2) The provisions of the Madras Court-Fees Amendment Act, 1922, shall otherwise, so far as may be, apply to the documents mentioned in Schedule II.

Grant of copies of proceedings, etc.

82. The President of a Board or committee may grant copies of the proceedings and records of the Board or committee, as the case may be, on payment of such fees and subject to such conditions as the Board may, by general or special order, determine. Copies shall be certified by the President of the Board or committee concerned in the manner provided in section 76 of the Indian Evidence Act, 1872.

Transitory provisions to govern existing committees

83. (1) Every committee established under the Religious Endowments Act, 1863, which is in existence at the commencement of this Act shall be deemed to have been duly constituted under the provisions of this Act.

(2) In their application to the members and presidents of committees in office at the commencement of this Act and the first reconstitution of such committees in accordance with this Act, the provisions of this Act shall be read subject to the rules contained in Schedule III.

Settlement of disputes regarding application of Act to maths and temples.

84. (1) If any dispute arise as to whether a math or temple is one to which this Act applies or as to whether a temple is an excepted temple, such dispute shall be decided by the Board.

(2) A trustee affected by a decision under sub-section (1) may within one year apply to the court to modify or set aside such decision but, subject to the result of such application, the order of the Board shall be final.

Removal of difficulties in working Act.

85. If any difficulty arise as to the first constitution or reconstitution of any committee after the commencement of this Act, or otherwise in first giving effect to the provisions of this Act, the Local Government, as occasion may require, may by order do anything which appears to them necessary for the purpose of removing the difficulty.

SCHEDULE I.

[See section 25.]

Part I—Qualifications of electors.

A person shall be qualified as an elector for an electoral area who has resided in such area for not less than 120 days in the previous year and who—

(*a*) was in the previous year assessed by a municipal council or local board to an aggregate amount of not less than twenty rupees in respect of one or more of the following taxes, viz.—

property tax,
tax on companies, or
profession tax, or

(*b*) was in the previous year assessed to income-tax, or

(*c*) is registered as a ryotwari pattadar or as an inamdar of land of which the annual rent value is not less than fifty rupees, or

(*d*) holds on a registered lease under a ryotwari pattadar or inamdar land the annual rent value of which is not less than fifty rupees, or

(*e*) is registered jointly with the proprietor under section 14 of the Malabar Land Registration Act, 1895, as the occupant of land, the annual rent value of which is not less than fifty rupees, or

(*f*) is a landholder holding an estate of which the annual rent value is not less than fifty rupees, or

(*g*) holds, as a ryot or tenant under a landholder, land the annual rent value of which is not less than fifty rupees.

Part II—Disqualifications of electors.

No person shall be entitled to have his name registered on the electoral roll of an electoral area who is subject to any of the following disqualifications:—

(*a*) is not a British subject;

(*b*) has been adjudged to be of unsound mind by a competent court; or

(*c*) is under twenty-one years of age.

SCHEDULE II.

[See section 81.]

Section. (1)	Description of the document. (2)	Proper fee. (3)
		RS.
43 (2)	Appeal to the committee by any office-holder or servant against an order of punishment by a trustee under sub-section (1) ..	2
43 (3)	Further appeal to the Board by a hereditary office-holder or servant against an order of the committee on appeal under sub-section (2) ..	2
43 (4)	Appeal to the Board by an office-holder or servant of an excepted temple ..	2
44	Application to court by the trustee to recover the amount from the person in possession or by the person in possession from the person responsible in law ..	The fee leviable on a plaint for the amount claimed under the Madras Court Fees Amendment Act, 1922.
53 (3)	Appeal to the Board or application to court against an order of suspension, dismissal or removal by the committee of a trustee ..	25
55 (4)	Apppeal to the Board by a trustee or person having interest against the order of a committee under sub-section (3) fixing standard scales of expenditure ..	10
55 (4)	Suit under the sub-section ..	50
57 (3)	Suit under the sub-section ..	50
57 (4)	Suit under the sub-section ..	50
62	Application to the Board by not less than 20 persons having interest for framing a scheme of administration for a math or excepted temple ..	50
63 (4)	Suit under the sub-section ..	50
65	Suit under the section ..	50
67 (4)	Suit under the sub-section ..	50
67 (5)	Suit under the sub-section ..	50
70 (2)	Application to court to recover from the funds of the endowment the contribution leviable by the Board or committee ..	2
73	Suits under the section ..	50
76 (2)	Application to the court by the trustee of a math or temple or any person having interest for modifying or cancelling any order of the	

Section. (1)	Description of the document. (2)	Proper fee. (3)
	Board sanctioning alienation of immovable property under sub-section (1) ..	Rs. The fee leviable on a plaint under article 17, Schedule II of the Madras Court Fees Amendment Act, 1922.
77 (2)	Application to a court to modify or set aside an order of the Board under sub-section (1) allocating any endowment, property or the income therefrom to religious and secular purposes ..	20
78	Application to the court for delivery of possession of endowments to a trustee appointed by the committee ..	2
84 (2)	Application to modify or set aside the decision of the Board under sub-section (1) ..	The fee leviable on a plaint under article 17, Schedule II of the Madras Court Fees Amendment Act, 1922.

SCHEDULE III.

[See section 83.]

Transitory Provisions.

1. The Local Government shall fix a date, not being later than one year from the commencement of this Act on which the term of office of members of committees holding office at the commencement of this Act shall expire:

Provided that a member who is also the president of a committee shall continue to exercise the functions of a president until a new president is elected under rule 4.

2. Any vacancy in the office of president of a committee which is in existence at the commencement of this Act or which occurs before the date on which a new president is elected under rule 4 shall be filled up under the provisions of this Act; and any vacancy in the office of member of a committee which is in existence at the commencement of this Act or which occurs before the date fixed under rule 1 shall be filled up by appointment by the Local Government:

Provided that any person elected or appointed as president or member under this rule shall hold office only up to the date referred to in rule 1.

3. The president of the committee shall cause arrangements to be made for election of members, so that the newly-elected members may come into office on the date fixed under rule 1 for the expiry of the terms of office of members holding office at the commencement of this Act.

4. On or as soon as may be after such date, a meeting shall be held on a day and at a time fixed by the president for the election of a new president.

THE PRESIDENCY SMALL CAUSE COURTS (MADRAS AMENDMENT) ACT, 1927.

ACT NO. III OF 1927.

An Act to amend the Presidency Small Cause Courts Act, 1882, *in its application to the Presidency Town of Madras.*

Whereas it is expedient to amend the Presidency Small Cause Courts Act, 1882, in its application to the Presidency Town of Madras for the purpose hereinafter appearing;

And whereas the previous sanction of the Governor-General has been obtained;

It is hereby enacted as follows:—

Short title.

1. This Act may be called the Presidency Small Cause Courts (Madras Amendment) Act, 1927.

Amendment of section 47, Act XV of 1882.

2. (*a*) In section 47 of the Presidency Small Cause Courts Act, 1882, for the words 'suit in the High Court against the applicant' the words 'suit against the applicant in the High Court or in the Madras City Civil Court, as the case may be,' shall be substituted; and

Amendment of section 49, Act XV of 1882.

(*b*) In section 49 of the same Act, after the words 'suit in the High Court' the words 'or in the Madras City Civil Court, as the case may be,' shall be inserted.

THE MADRAS HIGH COURT (JURISDICTIONAL LIMITS) ACT.

ACT NO. IV OF 1927.

The Madras High Court (Jurisdictional Limits) Act.

Whereas clause 11 of the Letters Patent for the High Court of Judicature at Madras, dated the 28th December, 1865, provides that the said High Court shall have and exercise ordinary original civil jurisdiction within such local limits as may from time to time be declared and prescribed by any law made by the Governor in Council;

And whereas it is expedient so to declare and prescribe the local limits of the ordinary original civil jurisdiction of the said High Court;

And whereas the previous sanction of His Excellency the Governor-General has been obtained; It is hereby enacted as follows:—

Short title.

1. This Act may be called the Madras High Court (Jurisdictional Limits) Act, 1927.

Limits of ordinary original civil jurisdiction of Madras High Court.

2. The ordinary original civil jurisdiction of the High Court of Judicature at Madras shall be exercised within the limits set out in the schedule:

Provided that nothing in this Act shall affect any suit or other legal proceeding pending in any Court at the date of the commencement of this Act.

ACTS OF THE MADRAS LEGISLATURE.

THE MADRAS LOCAL BOARDS (AMENDMENT) ACT, 1926.

ACT NO. I OF 1927.

[13*th Dec.* 1926 *and* 13*th Jan.* 1927.]

An Act to amend the Madras Local Boards Act, 1920.

WHEREAS it is expedient to amend the Madras Local Boards Act, 1920; It is hereby enacted as follows :— Preamble.

1. This Act may be called the "Madras Local Boards (Amendment) Act, 1926." Short title.

2. After section 157 of the Madras Local Boards Act, 1920 (hereinafter referred to as the said Act), the following section shall be inserted, namely— Insertion of new section 157-A to Madras Act XIV of 1920.

"157-A. All roads vested in or maintained by the local boards shall be open to persons of whatever caste or creed." Public roads open to all.

3. In section 167 of the said Act, after the words "public markets," the following words shall be added, namely— Amendment of section 167 of Madras Act XIV of 1920.

"and such markets shall be open to persons of whatever caste or creed."

4. In Schedule VIII to the said Act— Amendment of Schedule VIII of Madras Act XIV of 1920.

(1) after the item relating to section 157, the following item shall be inserted, namely—

157-A.	...	Obstructing a person in the use of roads.	One hundred rupees.

(2) after the item relating to section 166, the following item shall be inserted, namely—

167.	...	Obstructing a person in the use of public markets.	One hundred rupees.

THE MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, 1926.

ACT NO. II OF 1927.

[19*th January,* 1927.]

An Act to provide for the better administration and governance of certain Hindu religious endowments and to remove certain doubts as to the legality of the action taken and things done under the Madras Hindu Religious Endowments Act, 1923.

Preamble.

WHEREAS it is expedient to provide for the better administration and governance of certain Hindu religious endowments described hereunder;

AND WHEREAS diverse doubts have been raised as to the validity of the action taken and things done under the Madras Hindu Religious Endowments Act, 1923;

AND WHEREAS certain legal proceedings have been commenced in the High Court of Judicature, Madras, and certain courts subordinate thereto, questioning the said action and things;

AND WHEREAS it is expedient to remove those doubts and to validate the said action and things;

AND WHEREAS the previous sanction of the Governor-General has been obtained to the passing of this Act;

It is hereby enacted as follows :—

Short title.

1. This Act may be called the Madras Hindu Religious Endowments Act, 1926.

Extent.

2. This Act extends to the whole of the Presidency of Madras except the Presidency town and applies, save as hereinafter provided, to all Hindu public religious endowments.

Explanation.—For the purposes of this Act, Hindu public religious endowments do not include Jain religious endowments.

Power to exempt endowments.

3. (*a*) The Local Government may, after consulting the Board, exempt any such endowment from the operation of all or any of the provisions of this Act or vary, alter or cancel such exemption.

Power to extend Act to Jain endowments.

(*b*) The Local Government may, by notification, extend to Jain religious endowments the provisions of this Act and of any rules framed thereunder, and may declare such extension to be subject to such restrictions and modifications as they think fit :

Provided that before issuing such notification the Local Government shall publish in the *Fort St. George Gazette* a notice of their intention to do so, fix a reasonable period for the persons interested in the endowments concerned to show cause against the issue of such notification and consider their objections, if any.

Exemptions.

4. Nothing in this Act shall apply to any math or temple whose average annual gross income including income from endowments connected therewith for a period of five years immediately preceding the commencement of this Act was less than five hundred rupees in the case of maths and two hundred and fifty rupees in the case of temples :

Provided that the Local Government may, at any time, issue a notification declaring that all or any of the provisions of this Act shall apply to any such math or temple.

Saving of powers of Advocate-General.

5. Nothing in this Act shall be construed to affect, or in any way derogate from, the powers in respect of religious endowments which the Advocate-General may exercise under sub-section (2) of section 114 of the Government of India Act.

Repeal of Madras Act I of 1925.

6. The Madras Hindu Religious Endowments Act, 1923 (hereinafter referred to as 'the said Act') is hereby repealed.

7. (i) All action taken and all things done including the constitution of the Board of Commissioners for Hindu Religious Endowments, the notifications issued and orders made under and in pursuance of the said Act shall be deemed to have been validly taken, done, issued or made. Validation of action taken under Madras Act I of 1925.

(ii) All proceedings taken under the said Act may be continued under this Act in so far as they are not inconsistent with the provisions of this Act.

(iii) Any remedy by way of application, suit or appeal which is provided by this Act shall be available in respect of proceedings under the said Act pending at the time of the commencement of this Act as if the proceedings in respect of which the remedy is sought had been instituted under this Act.

8. The Religious Endowments Act, 1863, and the Madras Endowments and Escheats Regulation, 1817, so far as they apply to Hindu religious endowments to which this Act applies, are hereby repealed. Repeal of enactments.

9. In this Act, unless there is anything repugnant in the subject or context— Definitions.

(1) 'Board' means the Board as constituted under section 10. Board.

(2) 'Committee' means a committee as constituted under section 20. Committee.

(3) 'Court' means the court of the District Judge within whose local limits a committee exercises jurisdiction or a math or temple is situated. Court

(4) 'Electoral area' means an area containing the electors of a committee. Electoral area.

(5) 'Excepted temple' means Excepted temple.

(*a*) a temple which before 1801 was, and since 1863 has continued to be, under the sole management of a trustee whose nomination did not vest in, nor was exercised by, the Government nor was subject to the confirmation of the Government or of any public officer, or

(*b*) a temple founded since 1842, the right of succession to the office of trustee whereof is hereditary or specially provided for by the founder.

(6) 'Hereditary trustee' means the trustee of a religious endowment, succession to whose office devolves by hereditary right or by nomination by the trustee for the time being, or is otherwise regulated by usage or is specially provided for by the founder, so long as such scheme of succession is in force. Hereditary trustee.

(7) 'Math' means an institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples and succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage; and includes places of religious worship other than a temple or places of religious instruction which are appurtenant to such institution. Math.

(8) 'Non-hereditary trustee' means a trustee who is not a hereditary trustee. Non-hereditary trustee.

Person having interest.

(9) 'Person having interest' means—

(a) in the case of a math, a disciple of the math or a person of the religious persuasion to which the math belongs, and

(b) in the case of a temple, a person who is entitled to attend at the performance of worship or service in the temple or who is in the habit of attending such performance or of partaking in the benefit of the distribution of gifts thereat.

Prescribed.

(10) 'Prescribed' means prescribed by the Local Government by rules made under this Act.

Religious endowment.

(11) 'Religious endowment' or 'Endowment' means all property belonging to, or given or endowed for the support of, maths or temples or for the performance of any service or charity connected therewith and includes the premises of maths or temples but does not include gifts of property made as personal gifts or offerings to the head of a math or to the archaka or other employee of a temple.

Temple.

(12) 'Temple' means a place, by whatever designation known, used as a place of public religious worship and dedicated to, or for the benefit of, or used as of right by, the Hindu community, or any section thereof, as a place of religious worship.

Trustee.

(13) 'Trustee' means a person, by whatever designation known, in whom the administration of a religious endowment is vested and includes any person who is liable as if he were a trustee.

CHAPTER II.—*Boards of Commissioners.*

Constitution of Board.

10. (1) The Local Government may, by notification,

(a) direct the constitution of a Board for the whole Presidency or for any specified part thereof,

(b) vary the strength or territorial jurisdiction of any such Board, or

(c) abolish any such Board:

Provided that not more than one Board shall have jurisdiction over the same math or temple or the endowments connected therewith:

Provided further that, when the Local Government propose to direct the constitution of more Boards than one under this sub-section or to vary or abolish any Board, a draft of the notification proposed to be issued shall be published in the prescribed manner and laid on the table of the Legislative Council and the notification shall not be issued unless the Legislative Council by resolution approves such draft.

(2) The Local Government may pass such orders as they may deem fit as to the transfer or other disposal of the assets and liabilities of a Board which is varied or abolished.

Strength of the Board and its incorporation.

11. (1) A Board shall consist of a President and such number of other commissioners not being less than two nor more than four as the Local Government may fix.

(2) Every Board shall by such name as the Local Government may determine be a body corporate and shall have perpetual succession and a common seal and shall by the said name sue and be sued.